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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTION PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment prohibits the incarceration of a parent for civil contempt where the contempt hearing and related child visitation proceedings have been conducted largely in secret, and the trial court has failed to make specific findings adequate to support closure of the proceedings.

PARTIES

The appellant in the proceedings below was Dr. Jean Elizabeth Morgan. The appellee was her ex-husband, Dr. Eric A. Foretich. Their minor child, Hilary Foretich, was represented by a *guardian ad litem*, Linda P. Holman, Esquire.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Dr. Jean Elizabeth Morgan, respectfully prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals in this proceeding entered August 5, 1988.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals that is the subject of this petition is reported at 546 A.2d 407 (D.C. 1988) and reprinted in the Appendix at 1a-14a. Related opinions of the Court of Appeals are reported at 528 A.2d 425 (D.C. 1987) and 521 A.2d 248 (D.C. 1987) and reprinted in the Appendix at 15a-22a and 23a-34a, respectively.

JURISDICTION

The final judgment of the District of Columbia Court of Appeals was entered on August 5, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment V: [1]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This dispute began over six years ago when the petitioner, Dr. Jean Elizabeth Morgan, separated from her husband of seven months, Dr. Eric A. Foretich. It has resulted in Dr. Morgan being held in civil contempt and incarcerated for an indefinite period now exceeding fourteen months. Dr. Morgan has been denied a meaningful opportunity to publicize the full circumstances of her continued imprisonment—most importantly, the compelling reasons for her refusal to comply with the court's visitation order—because the trial judge has sealed the transcripts and records of virtually all proceedings, imposed a gag order on the parties, and closed the crucial portions of the contempt hearing to the public. Dr. Morgan thus remains in jail indefinitely as a result of civil contempt and related child visitation proceedings that have been conducted largely outside the public view.

This current state of affairs was produced by the following series of events and court decisions. Dr. Morgan

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[1] The due process safeguards of the Constitution are made applicable to the District of Columbia by the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

gave birth to her daughter, Hilary, in August 1982, shortly after she and Hilary's father, Dr. Foretich, were separated. Hilary thereafter lived with her mother. On November 8, 1984, then-presiding Judge Mencher of the Superior Court of the District of Columbia granted custody to Dr. Morgan, providing for alternating weekend visitations with Dr. Foretich. On that same date, Judge Mencher issued an order, at Dr. Foretich's request, excluding the press and public from the proceedings and sealing the record. App. at 39a-40a ("the closure order").

By November 1985, Dr. Morgan had accumulated evidence that she believed documented sexual abuse of Hilary by Dr. Foretich, and she sought a temporary restraining order suspending visitations by Dr. Foretich until such time as Hilary could be evaluated by medical and psychiatric experts.[2] After a hearing, Judge Dixon of the Superior Court found the evidence of sexual abuse to be inconclusive and he denied the motion to suspend visitation.

In February 1986, acting on the advice of her counsel and Hilary's therapist, Dr. Morgan stopped sending Hilary on weekend visitations. Dr. Foretich moved to hold Dr. Morgan in civil contempt. After a series of hearings held largely in closed session pursuant to the November 8, 1984 closure order, Judge Dixon found that Dr. Morgan had not proved sexual abuse by a preponderance of the evidence, and he held her in contempt for not sending Hilary on the court-ordered weekend visitations. Judge Dixon stayed his order of incarceration on the condition that Dr. Morgan produce Hilary for an indefinite visitation, and when she refused, he ordered her incarcerated on August 5, 1986.

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[2] Dr. Morgan's motion for a temporary restraining order was assigned to Judge Dixon of the Superior Court. Subsequently, on April 28, 1986, this case was assigned to Judge Dixon for all purposes.

At the August 5 civil contempt hearing, the attorneys for both parties sought clarification of whether the closure order prohibited out-of-court statements concerning the visitation and related contempt proceedings, and, if so, to what extent. Judge Dixon intimated that the intended scope of the closure order was broad, but he declined to rule formally on the requests for clarification. On August 11, 1986, Dr. Foretich asked the court to cite Dr. Morgan and her attorney for criminal contempt for statements allegedly made to the press after the civil contempt hearing. Dr. Morgan filed a similar motion with Judge Dixon on March 2, 1987, alleging that Dr. Foretich had also made out-of-court statements to the press.[3]

Dr. Morgan appealed the judgment of civil contempt, and on August 7, 1986 the District of Columbia Court of Appeals stayed Judge Dixon's order of incarceration pending appeal. On appeal, Dr. Morgan argued, *inter alia*, that Judge Dixon had violated her due process rights under the Fifth Amendment by denying her re-

[3] On July 7, 1987, Judge Dixon referred these contempt motions to the United States Attorney for the District of Columbia for possible prosecution; the United States Attorney in turn referred the motions to the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice. On September 20, 1988, the Department of Justice sent a letter to Judge Dixon informing him of its judgment that the cases lacked prosecutive merit and would not be pursued further. The letter explained that the November 8, 1984 closure order had—at the time of the alleged disclosures—been ambiguous with respect to whether it prohibited discussions of the civil contempt case with the public. The letter explained further that "[t]he scope of the restrictions were not defined for Dr. Morgan and her attorney at the August hearing despite counsel's statements that he did not understand the sealing orders as applicable." App. 75a. After receiving this letter, Judge Dixon issued an order directed to the parties inviting comment by November 4, 1988 on how the court should dispose of the criminal contempt motions, including whether the court should "exercise its inherent authority independent of the Department of Justice's decision." App. 63a-64a.

quest to open the August 5 civil contempt hearing to the public.

On November 26, 1986, prior to the Court of Appeals' decision on the Fifth Amendment issue, Judge Dixon issued an order denying the motion of the Washington Post to intervene for the purpose of asserting its First Amendment rights to attend the proceedings and to secure access to relevant pleadings and records. In that order, Judge Dixon took the opportunity to clarify that the November 8, 1984 closure order prohibited out-of-court-statements concerning the proceedings, including statements revealing Hilary's name, age, sex or address, and statements concerning "any specific act alleged to have been committed by or upon the child." The judge further explained that "[t]he most descriptive word which may be used [in the course of public disclosures] is 'abuse,' without reference to a particular kind of abuse such as physical, mental, psychological or sexual." App. 46a-47a.

The Court of Appeals released its opinion on Dr. Morgan's Fifth Amendment claim on February 6, 1987. The court found, based principally on this Court's decision in *In re Oliver*, 333 U.S. 257 (1948), that a defendant in a civil contempt proceeding "has a qualified [Fifth Amendment] right not to be incarcerated in a secret proceeding." App. 28a. The court went on to find, however, that the presumption of openness and the standard for closure that apply in criminal cases "do not apply to the evidentiary phase of a civil contempt hearing in a child custody and visitation rights case." App. 31a.[4] It never-

[4] In positing this rule, the Court of Appeals claimed to be writing on a "clean slate." App. 31a n.10. It noted that in *In re Oliver*, this Court had recognized the Fifth Amendment right of contemnors to a public trial in the context of grand jury inquiries, which historically have been *completely closed* to the public. It then suggested that neither this Court nor others had ever considered whether such a right obtained in the context of a proceeding (such as a child custody/visitation proceeding) *"other than one with a tradition of complete secrecy."* *Id.* (emphasis added).

theless remanded the closure issue to Judge Dixon for findings "specific enough for us to determine how he weighed the interests of appellant, appellee, and the child in the context of the qualified constitutional right of a civil contemnor to a public hearing that we recognize today." App. 33a.

A scant six days later, Judge Dixon issued findings reaffirming his previous decision to close the August 5 civil contempt hearing. Judge Dixon found that disclosure to the public of the sexual abuse allegations made by Dr. Morgan "would be embarrassing and damaging to the child and the child's reputation, now and in the future." App. 16a (quoting Judge Dixon's order). He also found that an open hearing would be unfair to Dr. Foretich. App. 17a n.2 (citing Judge Dixon's order). In an opinion issued on June 30, 1987, the Court of Appeals found these findings sufficient to warrant closure of the contempt hearing, reasoning that the need to safeguard the child's "best interest," standing alone, outweighed Dr. Morgan's qualified right to an open hearing. App. 17a.[5]

In the meantime, a four-day public trial was held in February 1987 in the United States District Court for the Eastern District of Virginia on Dr. Morgan's civil suit against Dr. Foretich for damages arising out of his alleged sexual abuse of Hilary, and Dr. Foretich's counterclaims alleging, *inter alia*, defamation of character. In this open trial, detailed evidence was presented concerning overt sexual acts allegedly perpetrated by Dr. Foretich.[6] This evidence detailing specific instances of

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[5] Between the time Judge Dixon found Dr. Morgan in contempt in August of 1986, and the time the Court of Appeals affirmed that order in June 1987, Judge Dixon held Dr. Morgan in contempt a second time for refusing to comply with further visitation orders. Dr. Morgan spent three days in jail on this second civil contempt finding from February 17, 1987 to February 19, 1987.

[6] Included in the Appendix are materials submitted by the Washington Post in connection with its motion to unseal the record in

sexual abuse is now part of the public record. On February 20, 1987, the jury found for Dr. Foretich on Dr. Morgan's claims and for Dr. Morgan on Dr. Foretich's counterclaims, and all claims were dismissed. The dismissal of Dr. Morgan's action was subsequently reversed by the Fourth Circuit on the grounds that Hilary's out-of-court statements describing sexual abuse by her father and evidence that Dr. Foretich also abused Hilary's half-sister had been improperly excluded. *See* p. 11 *infra*.

From February 1987 to August 1987, Judge Dixon was asked to reconsider the visitation/custody issue on several occasions. At each step of the way, Hilary's guardian urged Judge Dixon to appoint a multi-disciplinary team of neutral experts to evaluate Hilary's case and to suspend visitations until that evaluation was completed. Judge Dixon has repeatedly declined to follow that recommendation.

On April 13, 1987, Judge Dixon issued an order relieving the parties of certain disclosure restrictions imposed by his November 26, 1986 order. Specifically, he permitted the parties to mention Hilary's "name, age, sex and other biographical information, including identification of siblings," and to make reference to the terms "physical, mental, psychological, sexual or other types of abuse," in any discussions they might have with the press, media or general public. He reiterated, however, that the parties were prohibited from disclosing "any specific sex abuse allegation," either orally or through the release of documents. He further provided that "[p]rior to any reference in court to a specific sex abuse allegation, counsel shall discuss the matter at the bench so as to allow a determination if the hearing should be closed." App. 49a-50a.

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this case, including an affidavit of a Post reporter who attended the Virginia trial, and excerpts from the trial transcript. App. 121a-129a.

Between February and April 1987, Judge Dixon limited Dr. Foretich's visitations to brief, supervised periods. However, on April 21, 1987, without notice and hearing, he ordered unsupervised weekend visitations. On the very first weekend, Hilary reported being abused by her father, and subsequent weekend visits brought mounting evidence of sexual abuse.[7] Dr. Morgan and Hilary's guardian sought emergency stays in the Court of Appeals of several unsupervised weekend visits without success.

On August 19, 1987, Judge Dixon—finding that the evidence of sexual abuse was "in equipoise"—entered an order providing for an extended visitation from August 22 through September 6.[8] Dr. Morgan appealed this extension of Dr. Foretich's visitation rights, and again sought an emergency stay from the Court of Appeals, which was denied. When August 22 arrived, Dr. Morgan did not send her daughter on the extended visitation, based on her certainty that Dr. Foretich had sexually molested Hilary during previous visitations and advice from Hilary's therapist that a two-week unsupervised

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[7] Because the closure order remains in effect, petitioner has refrained from citing any evidence of specific acts of sexual abuse. That evidence, however, is reflected in the sealed transcripts and records, and consists of four types: (1) evidence that Dr. Foretich sexually abused his only other daughter; (2) physical evidence of sexual abuse of both Hilary and his other daughter; (3) psychiatric and psychologic evidence of abuse; and (4) evidence of Dr. Foretich's troubling psychological profile and history of violent behavior. The record also reflects the emotional trauma suffered by Hilary and the danger to her life and well-being brought about by her abuse. Transcript ("Tr.") at 136-57 (7/28/87) (testimony by Hilary's therapist that Hilary suffers from post-traumatic stress syndrome and that repeated threats to kill herself to avoid being with her father should be taken seriously).

[8] Judge Dixon's conclusion that the evidence of abuse was "in equipoise" appeared in his August 18 order refusing to stay an earlier weekend visitation, and was incorporated by reference in his August 19 order for extended visitation.

visitation "would be the ultimate destruction of Hilary." Tr. at 37 (8/26/87). Instead, she sent her daughter into hiding.

On August 24, 1987, Judge Dixon issued an order to show cause why Dr. Morgan should not be held in civil contempt, and set a trial date for August 26, 1987. In response, Dr. Morgan filed two motions; a motion requesting Judge Dixon to open the contempt hearing, unseal the record, and modify the closure order, and a motion requesting Judge Dixon to recuse himself from the contempt trial. In the former, Dr. Morgan argued, *inter alia*, (1) that the Fifth Amendment required the contempt hearing to be opened and the record unsealed so that the public could view the full circumstances of her noncompliance with the court's visitation order; and (2) that the asserted justification for closure—the need to protect Hilary's reputation—had faded as a consequence of the public disclosures in related proceedings. In the latter, Dr. Morgan alleged that Judge Dixon had decided from the outset of the proceedings that she had fabricated charges of sexual abuse and therefore had closed his mind to the ever-increasing evidence of abuse.[9]

Judge Dixon denied both motions.[10] In refusing to open the contempt hearing to the public, unseal the record, and modify the closure order, he merely reiterated his previous conclusion that disclosure of specific sex

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[9] Dr. Morgan further argued in support of her recusal motion (1) that closure of the courtroom during the contempt trial could do nothing but enhance Judge Dixon's ability to cling to his preconceived notions regarding the credibility of her allegations; and (2) that Judge Dixon had exhibited a desire to punish her.

[10] Judge Dixon did not issue his written findings and order denying Dr. Morgan's motion to open the hearing, unseal the record, and modify the closure order until *after* she had been held in contempt and incarcerated, and had filed an appeal challenging her incarceration on Fifth Amendment grounds. Accordingly, Dr. Morgan did not file a separate appeal once that written order was issued.

abuse allegations would damage Hilary's reputational interests.[11] He did not address Dr. Morgan's contention that such concerns had been largely mooted by developments in related proceedings.[12]

At the contempt hearing itself, Dr. Morgan testified that she had been justified in her refusal to comply with the court's extended visitation order because she was convinced to a moral certainty that compliance would result in the rape and emotional demise of her five-year-old daughter. Tr. at 35-44 (8/26/87). Judge Dixon permitted Dr. Morgan to present some evidence in support of her "necessity" defense (albeit in closed session), but at the conclusion of the hearing he brushed the defense aside as "disingenuous." *Id.* at 85. He then found Dr. Morgan in civil contempt and ordered that she be in-

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[11] Judge Dixon did open the civil contempt hearing for an exceedingly brief colloquy with Hilary's guardian, the closing arguments of counsel, and the announcement of his decision. Tr. at 71-93 (8/26/87). He also permitted the public to be present for a colloquy between himself and one of Dr. Morgan's attorneys on the issue whether he should admit the attorney *pro hac vice* (which he declined to do), and for the very beginning of Dr. Morgan's testimony. *Id.* at 3-14, 19-28. However, Judge Dixon ordered the courtroom closed as soon as Dr. Morgan began to recite the reason for her noncompliance with the court's extended visitation order—her firm, unshakeable and well-documented belief that Dr. Foretich had sexually abused Hilary. *Id.* at 28-71. Because Judge Dixon has also sealed the massive record of these proceedings, and imposed a gag order on the parties, the public has no basis for judging his competence and evenhandedness in evaluating Dr. Morgan's defense and committing her to indeterminate incarceration for civil contempt.

[12] In response to a Motion of the Washington Post To Intervene and for Access filed on March 23, 1988, Judge Dixon has unsealed the Superior Court clerk's record of docket entries, and promised to unseal the transcripts of those few proceedings that have been conducted in open court. App. 51a-62a. He has remained adamant, however, about his refusal to unseal the vast bulk of the record. *Id.*

carcerated until such time as she produced Hilary for the court-ordered visitation.

Dr. Morgan filed an appeal,[13] which was argued before a panel of the District of Columbia Court of Appeals on April 25, 1988.[14] Three weeks later, the United States Court of Appeals for the Fourth Circuit overturned the judgment dismissing Dr. Morgan's civil action for damages against Dr. Foretich, and remanded that portion of the case for further proceedings.[15] The Fourth Circuit held that the district court had erred both in excluding Hilary's out-of-court statements describing sexual abuse by her father and evidence that Dr. Foretich also abused Hilary's half-sister. App. 83a-98a. The court also found that the testimony of the doctors and other witnesses at trial was sufficient to justify a finding that Hilary had been sexually abused. App. 90a.

On August 5, 1988, the District of Columbia Court of Appeals issued its opinion denying all but one of the claims asserted by Dr. Morgan on appeal.[16] With respect to the closure issue, the court found that Judge Dixon had closed only a "limited" portion of the contempt hearing to the public, and that this "limited" clos-

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[13] Upon a motion by the Washington Post, the Court of Appeals ordered the appellate briefs to be redacted in conformity with the closure order, and then made available to the public. App. 35a. Otherwise, virtually all transcripts, pleadings, orders and records in these proceedings remain under seal.

[14] In the interim, Dr. Morgan sought a stay pending appeal in both the Court of Appeals and this Court, an expedited appeal, and an initial *en banc* hearing—all of which were denied.

[15] The Fourth Circuit affirmed the dismissal of Dr. Foretich's counterclaims. App. 98a-99a.

[16] The court upheld Dr. Morgan's contention that Judge Dixon had improperly ordered the forfeiture of a $200,000 bond.

ure did not violate the Constitution for the reasons set forth in its prior two opinions. App. 10a-11a.[17] The court declined to consider Dr. Morgan's contention that developments in the related federal action eliminated any conceivable justification for continued secrecy, *see* App. 106a, 115a, noting only that "[h]owever disclosures outside these proceedings and other developments may ultimately affect the issue of continued closure, we do not think the trial court erred in the limited closure of the contempt proceeding on appeal before us." App. 10a-11a.

The Court of Appeals gave equally short shrift to Dr. Morgan's argument that her noncompliance with Judge Dixon's extended visitation order was justified by her objectively reasonable belief that compliance would result in imminent and irreparable harm to her daughter. However, the court did not rely on Judge Dixon's conclusion that Dr. Morgan's assertion of this defense had somehow been "disingenuous." Rather, the court went further by holding that the defense of necessity was completely unavailable as a lawful defense to a civil contempt charge. The court opined that "[c]ivil contempt could become meaningless if a lawful defense could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance." App. 8a.

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[17] The court refused to consider the impact on Dr. Morgan's due process rights of "other aspects" of the closure order—including the restrictions on out-of-court statements and the sealing of the record—even though Dr. Morgan had filed a *single, pre-contempt hearing motion* with Judge Dixon to open the hearing, unseal the record, and modify the closure order, *see* note 10 *supra*, and even though Dr. Morgan had raised these "other" disclosure issues in her brief to the Court of Appeals, *see* App. 106a-107a, 119a-120a. Apparently, the court deemed it significant that Dr. Morgan appealed the contempt finding and accompanying order of incarceration before Judge Dixon issued his written order purporting to justify continued closure of these proceedings, and did not file a separate appeal once the written order was issued.

On August 30, 1988, the Court of Appeals denied Dr. Morgan's motion to stay the mandate pending application to this Court for a writ of certiorari. App. 37a-38a.[18]

REASONS FOR GRANTING THE WRIT

I. The closure order in this case violates Dr. Morgan's due process right not to be incarcerated in secret proceedings, and unduly restricts public debate in an area of increasing public importance and concern.

This is a shocking case. Dr. Morgan has presented overwhelming and largely uncontroverted evidence that Dr. Foretich has sexually abused his six-year-old daughter Hilary. Remarkably, Judge Dixon has concluded that this evidence of sexual abuse is merely "in equipoise," and, despite his own determination that there is thus a fifty percent chance that Dr. Foretich abused his child, has ordered an unsupervised, two-week visitation. The District of Columbia Court of Appeals has rubber-stamped Judge Dixon's factual findings and visitation order in what can only be characterized as a see-no-evil, hear-no-evil application of the abuse of discretion standard. Meanwhile, Dr. Morgan enters her fifteenth month in prison as a consequence of a contempt hearing and re-

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[18] On September 22, 1988, Dr. Morgan filed a habeas corpus petition in the Superior Court alleging that her continued incarceration on civil contempt charges has not and will not have its intended coercive effect, and that due process therefore requires that she be released. That case has been assigned to Judge Dixon, but has not yet been acted upon.

Dr. Morgan had previously filed a habeas corpus petition in the United States District Court for the District of Columbia, seeking release from incarceration on these same due process grounds. That petition was denied on the ground that the doctrine of comity required the due process issue to be raised in the state courts in the first instance.

lated child visitation proceedings that have been conducted largely outside the public view.

As shocking as this case is, it is but one of many arising with alarming frequency in this country. A study by The Association of Family & Conciliation Courts Research Unit estimates that sexual abuse charges are made in approximately two percent of contested custody and visitation cases,[19] and finds that judges are frequently relying on their civil contempt power in an effort to wrest obedience from parents who refuse to comply with visitation orders because they believe their children have been sexually abused. A recent article in Good Housekeeping magazine documents the case histories of nine women who have either been jailed or threatened with contempt for refusing to comply with visitation orders under such circumstances,[20] and these and other cases have attracted wide attention in both the print and broadcast media, as well as in professional circles.[21]

The public debate on this issue has centered largely on the capacity of the courts to deal appropriately with this

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[19] The study analyzes court data on child custody and visitation disputes in 12 states. It attributes the apparent rise in sexual abuse allegations in the 1980s to "greater public and professional awareness of sexual abuse and a greater willingness [on the part of parents] to disclose the problem," rather than to "an increase in the actual incidence of abuse or to a rash of false allegations designed to influence custody-visitation decisions." Association of Family & Conciliation Courts Research Unit, *Allegations of Sexual Abuse in Custody & Visitation Cases: An Empirical Study of 169 Cases From 12 States* 15-16 (March 1988).

[20] *See Mothers Who Go to Jail for Their Children*, Good Housekeeping, October 1988 at 158.

[21] In addition to the newspaper and magazine articles discussed herein and numerous other written accounts of these cases, there has also been extensive television coverage of the subject, including an October 16, 1988 "60 Minutes" report, a January 12, 1988 "Nightline" program and an April 6, 1988 Lifetime cable channel documentary entitled "Child Abuse: Innocence on Trial."

increasingly visible problem.[22] A Boston Globe article, for example, cites a six-year study at Harvard and Massachusetts General Hospital finding that courts disbelieved childrens' allegations of sexual abuse in approximately seventy-three percent of the cases studied, including one case in which a pediatrician documented the presence of semen in the child's vagina after a visit with her father.[23] Studies such as these have led many ex-

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[22] Examples of the difficult questions that have emerged from the judicial system's experience with sexual abuse allegations in the context of custody/visitation disputes include the following: Is it legitimate for a court not to hear from a child on grounds that she is too young to testify in the traditional sense? What is the appropriate role of experts and divorce courts in child sexual abuse proceedings? Who are the most qualified experts in child sexual abuse proceedings—classic Freudian child psychiatrists or psychologists and protective service workers who specialize in the field? Is a child's apparent affection for the alleged abuser evidence of the falsity of the charges, or is it analogous to the hostage's well-known psychological attachment to his captor? Can a very young child be coached to fabricate detailed accounts of sexual abuse, to exhibit the related behaviors and emotions, and to maintain the lie effectively? Are parents prone to fabricate sexual abuse charges to spite the non-custodial parent?

[23] The study included nineteen children age six or under who the researchers believed had been sexually abused by their non-custodial parent. In reaching the conclusion that these children had been abused, the researchers relied not only on the allegations of the children and/or their custodial parents, but also on evidence of physical and psychological symptoms such as premature sexualization, post-traumatic stress disorder, regression, infections and healed lacerations.

Other studies by the American Bar Association ("ABA") and the National Legal Resource Center ("NLRC") suggest that most child sexual abuse claims made in the context of custody/visitation proceedings are valid, and that deliberate falsifications of such charges are rare. *See Mothers on the Run*, U.S. News & World Report, June 13, 1988 at 22, 24 (citing ABA statistics); *Mothers on Trial*, The Washington Woman, Jul./Aug. 1987 at 16, 37 (citing the NLRC study); *see also* N.Y. Times, Nov. 14, 1987 at 1, 34 (citing conclusion of one expert that "[e]ven in custody disputes, the majority of sexual abuse allegations are true").

perts to conclude that the judicial system as presently constructed is ill-equipped to deal effectively with cases of alleged child sexual abuse, and that alternatives to judicial decision-making in these cases must be explored.[24]

Serious questions have likewise been raised about the judicial system's and society's treatment of parents who have acted on a reasonable, good faith belief that compliance with a visitation order would imperil the lives of their children. As judges have increasingly relied on their civil contempt power in these circumstances, desperate parents have begun to search for alternatives of their own. A great many have taken their children and disappeared into what has been termed the "new underground railroad"—a network of volunteers across the country that offers refuge to parents who have lost faith in the willingness and ability of the judicial system to protect their children from sexual abuse.[25] Others, like Dr. Morgan, have chosen to stay and defend themselves against charges of contempt, arguing that no compassionate and rational system of justice can compel a parent

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[24] *See, e.g.*, Boston Globe, Nov. 27, 1987 (citing conclusion of study author that "the court system should be changed so that child protection agencies take precedence over the divorce courts"); *Mothers on the Run*, at 24 (quoting experts who believe that judges find it difficult to credit allegations of sexual abuse, even in the face of clear medical evidence of abuse); N.Y. Times, Nov. 14, 1987 (quoting experts who believe that divorce courts are inherently unsuited to the task of protecting children from sexual abuse by a parent, and citing the growing debate over which institutions are best qualified to evaluate charges of sexual abuse); Washington Post, Apr. 6, 1988 at B4, col. 1 (reviewing the cable documentary "Child Abuse: Innocence on Trial," and concluding that the central message of the program was "that in handling the problem of sexual abuse as it relates to divorce and custody, the system isn't working. Neither the medical system, the social service system nor the legal system. Especially the legal—read, judicial—system").

[25] *See Mothers on the Run*, at 22.

—under pain of imprisonment—to act in a manner that she reasonably believes would destroy the life or mental health of her child.[26] Whether society is prepared to recognize such parental responses, and, if not, what alternatives are available to these parents, are questions of intense public debate and urgency.[27]

The closure order imposed in these proceedings has prevented Dr. Morgan's case from forming a meaningful part of this emerging public debate. To be sure, the case has attracted tremendous media attention and public interest, and there have been disclosures of some evidence of sexual abuse in related proceedings. Because of the closure order, however, the public has been given only a very general sense of how this case has proceeded and been disposed of by the District of Columbia courts—*e.g.*,

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[26] This so-called "necessity" defense has been raised in an increasing number of contempt cases involving allegations of sexual abuse. *See, e.g., Crabtree v. Crabtree*, 716 S.W.2d 923, 925-26 (Tenn. Ct. App. 1986) (recognizing defense); *Beckham v. O'Brien*, 176 Ga. App. 518, 336 S.E.2d 375, 378 (1985) (recognizing defense); *Cox v. Cox*, No. CA-6912 (Ohio Ct. App. Dec. 15, 1986) (recognizing defense); *Morgan v. Foretich*, App. 8a-9a (rejecting defense); *A.G. v. R.M.D.*, 730 S.W.2d 543, 546 (Mo. 1987) (en banc) (rejecting defense); *see also Davis v. Davis*, No. 86 CA 16 (Ohio Ct. App. Apr. 7, 1987) (recognizing discretion of trial court not to hold father in contempt where father had demonstrated sincere concern that compliance with visitation order would subject son to possible sexual abuse); L.A. Times, May 13, 1987 (citing case in which woman accused of "child-stealing" was permitted to submit evidence to jury that would support "necessity" defense).

As the above cases suggest, no consensus has yet emerged on this issue.

[27] *See, e.g., Mothers on the Run*, at 22 (noting that "[t]he new underground railroad presents daunting legal and ethical dilemmas"); *Mothers Who Go to Jail for Their Children* (discussing the dilemma of women forced to choose between subjecting their children to serious harm and breaking the law); Washington Post, Aug. 28, 1988 at C1 (noting that women are increasingly opting to flee with their children rather than attempt to defend their actions in a contempt hearing).

the bare fact of Dr. Morgan's allegations, Dr. Foretich's denials thereof, Judge Dixon's finding that Dr. Morgan had failed to prove sexual abuse by a preponderance of the evidence, the judge's incarceration of Dr. Morgan for civil contempt, and the Court of Appeals' affirmance. It has been denied access to the crucial information it needs —*the actual evidence of sexual abuse and the manner in which that evidence has been presented, argued, received (or excluded) and evaluated*—to form an intelligent judgment on the reasonableness of Dr. Morgan's noncompliance with the court's visitation order, the competence and fairness of the presiding judges, and the general competence of the courts as arbiters of child custody and visitation cases involving allegations of sexual abuse. The imprisonment of Dr. Morgan under these circumstances is inconsistent with the precedents of this Court and with notions of fundamental fairness, which require that a person deprived of her liberty be afforded the opportunity to expose the judicial process resulting in her incarceration to meaningful public scrutiny.

The most relevant precedent of this Court is *In re Oliver*, 333 U.S. 257 (1948). There, the presiding judge found the defendant in contempt for refusing to answer grand jury questions and, in a secret proceeding, ordered him incarcerated for sixty days or until such time as he answered the grand jury's questions. This Court reversed, holding, *inter alia*, that due process prohibited a court from depriving an accused contemnor of his liberty in proceedings isolated from public view.[28] In so holding,

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[28] Under Michigan law, the contempt proceedings at issue were characterized as "criminal," even though the defendant was entitled to purge himself of contempt by complying with the court's order—a typical feature of "civil" contempt. This Court explicitly held, however, that Michigan's characterization of the contempt proceedings was immaterial in resolving the due process question. 333 U.S. at 266 n.13. The key element for the Court, and the trigger for due process protection, was the deprivation of liberty suffered by the contemnor. *Id.* at 273. *See also In re Rosahn*, 671

the Court traced this country's "historic distrust" of secret proceedings, emphasizing that the public trial guarantee served as an effective constraint on the possible abuse of judicial power, and quoting Jeremy Bentham for the proposition that "[w]ithout publicity, all other checks [on judicial power] are insufficient: in comparison of publicity, all other checks are of small amount." *Id.* at 266-72.

This Court's latest pronouncement on the public trial guarantee came in *Waller v. Georgia*, 467 U.S. 39 (1984), in the context of a criminal defendant's claim that closure of a suppression hearing violated his Sixth Amendment right to a public trial. The Court, quoting *In re Oliver*, reiterated the importance of the public trial guarantee and its capacity for deterring possible judicial abuse. *Id.* at 46. Borrowing from its First Amendment jurisprudence, the Court held that criminal trials and related suppression hearings were subject to a "presumption of openness" that could be overcome

> only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 45 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). The Court also held that a defendant need not prove prejudice in order to obtain relief for a violation of the public-trial guarantee. *Id.* at 49-50.

Judge Dixon's decision to close the crucial portions of Dr. Morgan's contempt hearing, seal the record of the proceedings and impose a gag order on the parties, and the Court of Appeals' affirmance of Dr. Morgan's incar-

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F.2d 690 (2d Cir. 1982) (applying *In re Oliver* to "civil" contempt proceedings resulting in incarceration).

ceration under these circumstances, cannot be justified under this Court's precedents. Moreover, they set a dangerous precedent of their own in an area of law where public debate desperately needs to be encouraged, not suppressed. For these reasons, the Court should grant this petition for certiorari and reverse the judgment below.

The District of Columbia Court of Appeals, relying on *In re Oliver*, recognized that a civil contemnor has a due process right to a public trial. However, the court went on to eviscerate this right substantially by concluding that a "presumption of openness" does not attach if the contempt hearing arises in the context of child custody/visitation proceedings. The Court distinguished *In re Oliver* as a case in which the contempt arose in the context of grand jury proceedings—which have a tradition of complete secrecy—and asserted that it was writing on a "clean slate" in deciding the extent to which *In re Oliver* applied to cases *without* such a tradition.

The rationale offered by the Court of Appeals for dispensing with the "presumption of openness" in contempt cases arising out of child custody/visitation proceedings is, frankly, bizarre. Because the due process right to a public trial applies even where the contempt arises in the context of proceedings with a tradition of *total* secrecy, *In re Oliver*, it *a fortiorari* applies where the contempt arises in the context of proceedings that do *not* have such a tradition. More fundamentally, this Court's precedents provide no basis for lumping together an entire class of cases for purposes of defining a defendant's Sixth Amendment or due process right to a public trial.[29] The basic

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[29] In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), this Court struck down on First Amendment grounds a Massachusetts statute that required judges to exclude the press and general public from the courtroom during the testimony of minor victims in sex-offense trials. In so holding, the Court rejected Massachusetts' attempt to identify a generic class of cases

right to a public trial cannot be overcome by mere invocation of the fact that certain proceedings typically involve sensitive or disturbing subject matter. It may, as this Court has held, be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise*, 464 U.S. at 510).[30]

The courts below failed to heed this Court's admonition that the right to a public trial may not be cavalierly balanced away, and, in the process, displayed a remarkable insensitivity to the core purposes of the public trial right. Dr. Morgan argued below that the principal functions of the right—to curb possible abuses of judicial power and to promote informed discussion of public affairs—were especially relevant in this case—the former because a powerful recusal motion had been lodged against Judge Dixon, *see* n.9 *supra* and accompanying text;[31] the latter

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in which closure would be required. It insisted instead on a "case-by-case" analysis in which the particular circumstances of each case would be carefully considered in determining whether there existed sufficiently weighty state interests to overcome the presumption of openness. 457 U.S. at 608.

[30] The Court in *Waller* found that appropriate circumstances for limiting a defendant's constitutional right to a public trial "will be rare," and cautioned that lower courts must balance countervailing rights and interests "with special care." *Waller*, 467 U.S. at 45.

[31] In *In re Oliver*, this Court recognized that improper judicial motives flourish in secrecy, and that it is the purpose of public trials to inhibit them:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

333 U.S. at 270 (footnotes omitted). *See also Applications of National Broadcasting Co.*, 828 F.2d 340, 345 (6th Cir. 1987)

because the capacity of courts to deal with allegations of sexual abuse and the response of parents to the failings of the judicial system are issues of extreme public importance and concern. *Neither* of these points were acknowledged or discussed by Judge Dixon or the Court of Appeals.[32]

While reducing Dr. Morgan's right not to be deprived of her liberty without due process of law to a mere token, the District of Columbia Court of Appeals accepted uncritically Judge Dixon's speculation that disclosure of evidence of sexual abuse would be "embarrassing and damaging to the child and the child's reputation, now and in the future."[33] Such speculative, inchoate reputa-

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(holding that the First Amendment required proceedings and records relating to a motion for recusal in a criminal trial to be open to the public, because, *inter alia*, "[w]hen a judge's impartiality is being questioned, it strengthens the judicial process for the public to be informed of how the issue is approached and decided").

[32] The Court of Appeals' insensitivity to Dr. Morgan's public trial right is further suggested by its casual—and misleading—characterization of Judge Dixon's closure of the contempt proceedings as "limited." App. 11a. As noted earlier, *see* n.11 *supra*, Judge Dixon closed the critical portion of the contempt hearing in which Dr. Morgan testified to her reasons for not complying with the extended visitation order. Moreover, he applied the closure order not only to the contempt hearing itself, but to the transcripts and records of related proceedings, and to the parties' out-of-court statements. The degree to which Judge Dixon has suppressed information needed by the public to assess intelligently the judicial response to this case cannot fairly be characterized and dismissed as "limited." He effectively blocked Dr. Morgan's defense from public view.

[33] Judge Dixon's extreme solicitude for the inchoate reputational interests of Hilary is difficult to reconcile with his decision—over the repeated objections of Hilary's guardian and the urgent pleas of Hilary's mother—to order an unsupervised, two-week visitation after finding that the evidence of sexual abuse was "in equipoise," and that there was thus a fifty percent chance that Hilary had been sexually abused by her father.

tional interests are plainly insufficient under this Court's precedents to override a defendant's liberty interests.[34] This is particularly the case where, as here, a significant amount of the evidence that might prove embarrassing to Hilary has been disclosed in other proceedings.[35] Again, these arguments were raised in the courts below and were ignored—the Court of Appeals going so far as to suggest that Dr. Morgan would have to remain in jail

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[34] In *Globe Newspaper*, this Court found that a state's asserted interest in protecting a minor victim of sexual abuse from the direct and immediate "trauma and embarrassment" of testifying in the presence of the public and press might, under the circumstances of a particular case, justify closure of the courtroom during the victim's testimony. 457 U.S. at 607; *see also State v. Workman*, 14 Ohio App. 3d 385, 471 N.E.2d 853, 859-60 (1984) (relying on *Globe* to justify closure during the testimony of two child rape victims who were considerably nervous about testifying). Hilary has not testified in any of these proceedings, and we are aware of no case in which a court has relied on *Globe* to justify closure to protect the interests of a nontestifying person.

Globe, moreover, involved the First Amendment rights of the public and press. State interests that might sometimes be sufficient to overcome First Amendment interests should not necessarily be deemed adequate to override a defendant's liberty interests. *Cf. Waller*, 467 U.S. at 46 ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.' ") (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

[35] This Court has observed that "interests in privacy fade when the information involved already appears on the public record," particularly where the asserted privacy interests are juxtaposed against rights protected by the Constitution. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); *cf. Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (state interest in protecting the anonymity of a juvenile offender held insufficient to overcome the First Amendment right of a newspaper to publish the offender's name where the name was already in the public domain).

for an additional, indefinite period before she would be entitled to argue that disclosures in other proceedings undermined any conceivable justification that might once have existed for closure.[36]

In sum, the District of Columbia courts have misapplied this Court's precedents and established a dangerous precedent of their own in an area of law that can little afford doctrinal confusion. The mischief wrought by the courts' decisions, however, extends far beyond the warping of abstract legal principles. Those decisions have permitted Judge Dixon—whose openmindedness and impartiality have been seriously questioned—to jail Dr. Morgan for a period now exceeding fourteen months without having to consider that his actions would be subject to meaningful review in the forum of public opinion.[37] They have also established a precedent allowing judges to insulate themselves from meaningful public scrutiny in an area where questions of judicial competence, parental judgment, and the safety and health of children are increasingly being raised. If this dangerous precedent is not overturned, judges forced to make critical and controversial decisions in this area will likely be tempted to choose secrecy over vigorous public

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[36] *See* App. 10a-11a ("However disclosures outside these proceedings and other developments may ultimately affect the issue of continued closure, we do not think the trial court erred in the limited closure of the contempt proceeding on appeal before us."). Dr. Morgan raised this argument before Judge Dixon (who likewise ignored it) prior to the contempt hearing, *see* pp. 9-10 *supra*, and thus could not have been deemed to have waived it on appeal.

[37] Whether Judge Dixon would have decided this case differently had he been required to open the contempt hearing and unseal the record is unknown and unknowable. However, this Court has held that defendants need not prove prejudice in order to obtain relief for a violation of the public-trial guarantee. *Waller*, 467 U.S. at 49. A requirement that defendants establish prejudice would make vindication of the right virtually impossible, because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." *Id.* at 49 n.9.

debate.[38] This Court should grant the petition for certiorari and reverse the judgment of the Court of Appeals, both to halt the continuing constitutional violation to which Dr. Morgan has fallen victim, and to affirm that the right to a public trial extends to defendants who are being jailed in increasing numbers by judges struggling to deal with the elusive societal problem of child sexual abuse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 3, 1988

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[38] To our knowledge, there are no statistics indicating the frequency to which judges have resorted to closure in this context. However, in at least one of the more celebrated cases that resulted in the imprisonment of a parent for seven months, it appears that the proceedings were conducted largely in secret, and that the parties were barred from discussing the case with the media. *See Trial Begins in Highly Publicized Tug-of-War Over 9-Year Old Girl*, Associated Press, May 2, 1988.

88-737

No. 88-

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 86-1615, 87-33, 87-936, 87-942 and 87-987

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

Argued April 25, 1988

Decided Aug. 5, 1988

Stephen Sachs, with whom John Vanderstar and G. Allen Dale, Washington, D.C., were on the brief, for appellant.

Eric A. Foretich, pro se.

Linda P. Holman, Washington, D.C., guardian ad litem.

Before MACK, BELSON and STEADMAN, Associate Judges.

STEADMAN, Associate Judge:

The formal parties to this appeal are the divorced parents of a daughter, H, the ultimate real party in interest. She was born in 1982. On November 8, 1984, appellant Morgan was awarded custody of H and appellee Foretich was given liberal visitation. Almost continuously since that date, the parties have been in litigation on these

issues, with numerous appeals to this court and two published opinions. *See Morgan v. Foretich*, 521 A.2d 248 (D.C.1987) (*Morgan I*), and 528 A.2d 425 (D.C.1987) (*Morgan II*). Now before us is an appeal from an order of August 19, 1987, granting Foretich a two-week summer visitation with H and a subsequent order of civil contempt and imprisonment of Morgan for refusal to comply with the August 19 order.[1]

I.

Some of the background facts, through August of 1986, were recited in our previous opinions. In January 1985, within two months of the custody and visitation order of November 8, 1984, Morgan began to make accusations that Foretich was sexually abusing H during visitation. Motions were filed by both parties relating to changes in custody and visitation and with respect to evaluation of H. These motions were set for hearing before Judge Herbert B. Dixon in November 1985. In his order of December 27, 1985, Judge Dixon denied all these motions with the exception of a minor modification of Foretich's visitation rights.

Matters first came to a head in February 1986, when Morgan refused to allow H to visit Foretich in accordance with the court-ordered visitation schedule. Hearings were held in June and July of 1986 on several motions, including Foretich's motions to hold Morgan in contempt and for change of custody and Morgan's motions for temporary suspension of visitation and to compel discovery. On July 17, 1986, Judge Dixon orally announced his finding that Morgan had failed to prove by a preponderance of the evidence that Foretich had

[1] Also before us and dealt with in this opinion are certain collateral orders, entered in the same time frame, relating to recusal and closure. Prior appeals consolidated with the appeals from the two-week visitation and civil contempt orders are effectively mooted by our decision today.

abused H, and that Morgan had disobeyed the visitation orders without lawful justification or excuse. A series of further hearings and orders then ensued, resulting in a finding of contempt and order of incarceration in August 1986. We stayed the order pending appeal, with various conditions including the posting of a security approved by the court in the amount of $200,000. On appeal, we upheld the closure of the contempt hearings, *Morgan I*, *supra*, and affirmed the judgment of contempt, *Morgan II*, *supra*.

Meanwhile, Judge Dixon had ordered that visitation be resumed. When Morgan again failed to comply, Judge Dixon found her in contempt and ordered her incarcerated on February 17, 1987. Morgan was released from jail on February 19, 1987, and on February 24, 1987, visitations resumed for the first time in over a year. From February 24 through April 1, 1987, the visits were supervised and lasted one hour. On April 1, Judge Dixon ordered that the visits be extended to four hours.[2]

On April 6, 1987, Judge Dixon began a series of hearings on a motion by Foretich for a change of custody and termination of Morgan's parental rights and on Morgan's cross motion to suspend visitation, or, in the alternative, to require supervised visitation. Seventeen days of hearings with numerous witnesses were held over the course of the spring and summer, ending on August 21, 1987.

During the course of the hearings on the motions, Judge Dixon entered several orders continuing to gradually expand the visitation schedule. On April 21, 1987, he ordered the first overnight unsupervised weekend visi-

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[2] Though Judge Dixon entered an order for unsupervised four-hour visits, Foretich invited H's guardian ad litem to supervise the visits. All of the visits were in fact supervised by the guardian until the court expanded them to overnight visits.

tations. Pursuant to further orders, H spent nine or ten weekends with Foretich. Several emergency stays of the weekend visitation orders sought by Morgan and H's guardian were denied by this court. H's guardian played some part in most of these weekend visits and submitted reports of her observations to Judge Dixon.

Then on August 19, 1987, with the hearings still not completed,[3] Judge Dixon entered an order providing for an extended visitation from August 22 through September 6, 1987. In his six-page order, he noted, *inter alia*, that since H was scheduled to return to school on September 8, "[w]hatever the court's ultimate ruling may be on the pending motions, to further delay the defendant-father's entitlement to summer visitation with his child until that ultimate ruling results in a denial of said summer visitation by default." [4]

Morgan appealed this visitation order that same day. Her emergency motion for stay pending appeal filed the following day was denied by this court on August 21. Morgan failed to comply with the visitation order. She secreted the child and refused to reveal her whereabouts. (To this day, H remains hidden.) On August 24, Judge Dixon issued an order to show cause why Morgan should not be held in contempt. On the same day, Morgan moved to have Judge Dixon recuse himself on the ground that he had prejudged both her credibility and the evidence on which her defense rested. She also moved

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[3] The final day of receiving courtroom evidence was on August 21. It was agreed at that time that the parties would submit proposed findings of fact and comprehensive closing arguments in the way of a post-trial brief, as well as any further evidentiary proffers, by September 11, with further time for responses thereto. We were advised at oral argument that no final trial court rulings have been made on the motions which were the subject of the April-August hearings.

[4] The order also provided for seven weekend visits during the fall months of 1987.

to open her contempt hearing to the public, unseal the record and modify a closure order of April 13.[5]

After a hearing held on August 26, Judge Dixon held Morgan in contempt and ordered her incarcerated, effective August 28. He also ordered that the security posted one year earlier pursuant to this court's order be forfeited at the rate of $5,000 per day. On August 27, Morgan appealed the contempt judgment and sought a stay pending appeal. The stay was denied and Morgan was incarcerated on August 28, where she remains.

II.

A principal issue before us is whether the record supports the trial court's action in ordering a two-week summer visitation. Our standard of review is well-established. Trial court decisions as to visitation rights are reversible only for clear abuse of discretion. *Hamel v. Hamel*, 489 A.2d 471, 475 (D.C.1985); *Jackson v. Jackson*, 461 A.2d 459, 460 (D.C.1983). By statutory command, a trial court judgment may not be set aside except for errors of law, unless it appears the judgment is "plainly wrong or without evidence to support it." D.C. Code § 17-305(a) (1981). Thus, to the extent that such decisions rest on factual foundations, such findings are binding unless clearly erroneous. *Morgan II*, *supra*, 528 A.2d at 429; *District-Realty Title Insurance Corp. v. Forman*, 518 A.2d 1004, 1007 (D.C.1986). Such is particularly the case where, as here, the findings rest in significant part on considerations of credibility. *See, e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985); *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 546-47 (D.C.1981). "If the [trial court's] account of the evidence is plausible in light

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[5] Essentially, that order restricted public disclosure of specific sex abuse allegations in this proceeding or documents, records or images concerning the same.

of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, *supra*, 470 U.S. at 573-74, 105 S.Ct. at 1511.

The critical factual determination challenged by Morgan was that sexual abuse of H by her father had not been proven, or, as the court put it, the evidence was "in equipoise." That finding, asserts Morgan, was "plainly wrong."

As indicated in the facts recited above, this issue has been in dispute between the parties since January of 1985. As a result, a trial court file has developed in this case of a size apparently unequaled in a District of Columbia domestic relations proceeding.[6] Morgan asks that the entire record be taken into account, but in particular focuses upon the evidence presented in the 17 days of hearings between April and August of 1987. She notes, of course correctly, that our prior opinion affirming the trial court did not extend to developments subsequent to August 1986.

A review of the record shows that there was probative evidence on both sides of the issues of abuse. The ultimate question, however, is not how we weigh the evidence but rather whether a finder of fact, fully and personally knowledgeable of not only the evidence presented in the April to August hearings but also the entire history of these proceedings from November 1985 forward,[7] would be clearly erroneous in concluding that

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[6] The proceedings in 1985, 1986, and 1987 consist of some 4,000 pages of transcript with approximately 75 witnesses, according to Morgan's own brief.

[7] At one point in the proceedings, Judge Dixon observed that with one more change of attorneys, he, the trial judge, would be the longest participant in the litigation short of the parties themselves.

the alleged sexual abuse had not been proven and would commit a clear abuse of discretion in allowing a two-week visitation. We cannot so conclude.

It is important to keep in mind the posture of the case at the time of the challenged order. The underlying matters before the court were Foretich's motion for change of custody and Morgan's cross-motion to suspend visitation. Evidentiary hearings on those motions were coming to a close. So was the summer, with H scheduled to return to school in early September. H's relationship with her father, interrupted for over a year by Morgan on grounds found baseless at the time, had been resuming on a gradual basis. The court was satisfied that any prospect of physical or emotional harm beyond that already caused by the litigation was effectively neutralized.[8] With the ultimate issue still open, the court was dealing with the reality that a child's life was moving on.[9]

In this litigation, neither party can conclusively speak for H. She has her own champion, a court-appointed guardian. Although the guardian states that she is in clear disagreement with the trial court's order for the extended summer visitation, we think correct her assessment that she "cannot argue that the order was without evidence to support it or an abuse of Judge Dixon's discretion."

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[8] The court cited its continuous availability for emergency hearings, Morgan's right to reasonable telephone contact with the child during visitation, monitoring of the visitation by the guardian, and the presence of Foretich's parents or his wife with the child during visitation.

[9] Understandably the court was unwilling at that moment to make a definitive finding. As it noted, its ultimate ruling on pending issues could range "from a limitation imposed upon [Foretich's] rights of visitation and a denial of his motion for change of custody, to an order granting [Foretich's] motion for a change of custody and imposition of limitations upon [Morgan's] rights of visitation, or to an order committing the child to a foster care placement."

III.

Morgan raises four other issues in this appeal. Only one, the challenge to the forfeiture of the posted security, reveals reversible error. See Part IV, *infra*.

1. *Defense of necessity.* Criminal law recognizes the doctrine that an otherwise criminal act is excused "if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law." *Griffin v. United States*, 447 A.2d 776, 777 (D.C.1982), *cert. den. sub nom. Snyder v. United States*, 461 U.S. 907, 103 S.Ct. 1879, 76 L.Ed.2d 810 (1983). This defense of necessity does not require proof that harm is actually occurring, but only that the defendant have a reasonable belief that harm is imminent. *Id.* at 778. It does not exonerate one who has the opportunity to resort to "a reasonable legal alternative to violating the law." *Id.*

Morgan argues that this doctrine should apply on the facts of this case. To some extent this is a variant of the argument presented on the prior appeal that contempt does not lie where the mother has a "duty to protect the child from abuse." *Morgan II*, *supra*, 528 A.2d at 428. In any event, the situation here is far different from that facing one who violates a criminal law. Here there was a specific court order, requiring specific conduct tailored to a specific fact situation—an order which we on appeal had refused to stay. Civil contempt could become meaningless if a lawful defense could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance.[10] To the extent that noncompliance may be justified as preserving the opportunity for appellate review, the defier acts at his or her peril in

[10] The same may be said of Morgan's argument that the Parental Kidnapping Prevention Act recognizes a defense if the action "is taken to protect the child from imminent physical harm." D.C. Code § 16-1023(a)(1) (1987 Supp.).

so doing. *Bolden v. Bolden*, 376 A.2d 430, 432-33 (D.C. 1977) ("It is axiomatic in our system of jurisprudence that where a court with jurisdiction over both the subject matter and the parties enters an order, such order must be obeyed."); *In re Banks*, 306 A.2d 270, 274 (D.C. 1973).

2. *Trial judge disqualification.* Subsequent to the entry of the two-week visitation order but prior to the contempt proceeding, Morgan moved to have Judge Dixon recuse himself. This motion was denied. Morgan argues that constitutionally she was entitled to an impartial judge, an argument not in dispute. What is in dispute here is whether she was denied such a judge. Normally, bias must stem from an extrajudicial source, *In re Thompson*, 419 A.2d 993, 995 (D.C.1980); *Gregory v. United States*, 393 A.2d 132, 142 (D.C.1978), although an extreme manifestation of bias during trial can result in disqualification. *Whitaker v. McLean*, 73 App.D.C. 259, 118 F.2d 596 (1941) (judge's bias during trial appeared to have become "overpowering"). We think any such allegation here is without foundation. Morgan points to rulings by the trial court refusing to permit participation in the contempt hearing by an out-of-state member (new to the case) of the major law firm representing her,[11] and to rulings excluding evidence. These may or may not be errors of law,[12] but they hardly constitute strong evidence of bias. No trial court conduct

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[11] This firm member was presented at the beginning of the contempt hearing on a motion to be admitted pro hac vice, which was denied.

[12] Such rulings, although Morgan's brief styles them as erroneous and makes references to the excluded evidence, are not argued as separate major assignments of error; rather, the rulings are focused on as indicia of bias. Indeed, the rulings in their own right would seem more readily reviewable on appeal from a final judgment on the motions. See note 3, *supra*. Morgan's basic position as we understand it is that on the evidence actually before the trial court, it was plainly wrong in concluding as it did.

could survive such a test. Morgan also asserts that Judge Dixon prejudged her credibility in past proceedings and thus is disqualified from sitting at this subsequent proceeding, citing *Keating v. Superior Court*, 45 Cal.2d 440, 289 P.2d 209 (1955) (trial judge stated that he believed the defendant had willfully given false testimony and that he therefore had no confidence in the defendant's integrity and veracity or in certain books of account kept by the defendant). This argument is significantly brought into question by the failure to raise any bias objection during the April to August hearings. In any event, the record does not establish that recusal was called for here.[13]

3. *Public trial on contempt charges.* A good portion of the proceedings on August 26, the hearing on the contempt show cause order, was open to the public. The hearing was closed only for the segment of Morgan's testimony when she insisted upon reciting allegations as to specific acts of sexual abuse upon H. She argues that this limited closure violated her First and Fifth Amendment rights to an open hearing. In so doing, she invites us essentially to revisit the issues decided in our prior Morgan opinions. This we decline to do.[14]

As we recently reasserted in *Mokhiber v. Davis*, 537 A.2d 1100, 1108 n. 8 & 1115-16 n. 13 (D.C.1988), family cases involve special considerations. However disclosures outside these proceedings and other developments may

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[13] The guardian has provided her views on this issue as follows: "Judge Dixon has demonstrated no impermissible bias which would require his recusal. . . . Judge Dixon has exercised great patience and restraint with appellant. He has afforded her courtesy throughout the proceedings. . . . The delay and inconvenience that would result from the trial court's disqualification and the subsequent reappointment of another judge is unthinkable."

[14] Although we did not expressly discuss any First Amendment rights that Morgan may have, First Amendment cases were specifically considered in the opinion.

ultimately affect the issue of continued closure, we do not think the trial court erred in the limited closure of the contempt proceeding on appeal before us.[15]

IV.

In addition to the civil incarceration of Morgan, the trial court's written order of August 27, 1987 provided:

> That the plaintiff's $200,000.00 bond previously posted following this Court's order of August 5, 1986, shall be and hereby is forfeited at the rate of $5,000.00 per day, excluding Saturdays, Sundays and legal holidays, until the minor child has been taken into the custody of this Court and made available to the defendant for visitation and for placement in accordance with the further order of this Court.

Morgan asserts that the trial court lacked authority to impose this specific condition. We agree.

The $200,000 security was posted pursuant to the order of this court which stayed the civil contempt adjudication in August 1986. It took the form not of a surety bond but rather of a deed of trust on certain real property owned by Morgan, with the then Clerk and Deputy Clerk of our court named as trustees. By its terms, the deed of trust applied "in the event of [Morgan's] failure to appear before the Superior Court . . . in the event that her commitment pursuant to the

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[15] Morgan also challenges other aspects of the order of April 13, 1987, limiting disclosures in this case. See note 5, *supra*. This order was not appealed when entered, and it does not appear that these issues are properly before us at this time. Unlike the motion to open the hearing, which was denied on August 26, we are unable to find in the record any ruling regarding the unsealing of the record or modification of the closure order until the written order of September 18, 1987, from which no further appeal was taken. *See McClurkin v. United States*, 472 A.2d 1348, 1352 (D.C.), *cert. denied*, 469 U.S. 838, 105 S.Ct. 136, 83 L.Ed.2d 76 (1984).

August 5, 1986, contempt order of that court is finally affirmed on appeal."

On June 30, 1987, we affirmed the contempt order. The mandate was issued on July 21, 1987. By that time, events had long since moved on to further matters. Morgan was regularly appearing before the trial court. Any issue of continuing contempt for failure to obey the orders entered in 1986 was moot.

It is a settled principle of law that a mortgage or bond or deed of trust or other security instrument operates as security for only those obligations which are covered by the agreement of the parties and identified by it. *See, e.g.*, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 26 (2d ed. 1985); 12 AM.JUR.2d *Bonds* § 25 (1964); *United States v. Powell*, 639 F.2d 224, 225 (5th Cir.1981) (criminal fine imposed upon defendant cannot be satisfied from appearance bond). There is nothing in the record to show that Morgan agreed that the deed of trust should be converted from essentially an appearance bond to one securing her compliance with trial court orders generally.[16] Therefore, the trial court had no power to, in effect, order a foreclosure on the deed of trust because of Morgan's noncompliance with his subsequent August 1987 orders. By that time, the deed of trust had no more effect than a mortgage fully repaid although not yet cleared from the record. *See* G. NELSON & D. WHITMAN, *supra*, at 435-38. While it is true that the trial court could have imposed a fine in the amount of $5,000, that specific course of action was not chosen. Any attempt to do so in the manner chosen here must be deemed abortive.

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[16] In an order of December 19, 1986, finding Morgan in contempt for failing to comply with an October 1986 order for a supervised one-hour visit, the trial court stayed enforcement of the contempt order pending appeal, "in accordance with the same conditions as those imposed by the District of Columbia Court of Appeals in its Order of August 7, 1986." Although the appeal may be technically still before us, see note 1, *supra*, events have overtaken that December 1986 order as well; visitations resumed in February 1987.

V.

A Kikuyu proverb tells us: "When elephants fight it is the grass that suffers." [17] Here, the grass is a little girl who will be six years old this month. For almost a year, she has been deprived of the company of both father and mother. She is the principal figure in a drama of appalling proportions, no matter what the outcome.

The trial court here, as in many family division matters, has the deeply taxing and unenviable responsibility of struggling to deal justly with changing lives. Inherent in the process are new developments and events. One such development occurred at oral argument before us. In her brief to us, Morgan urged, as a "wiser and fairer" alternative, the appointment of a multi-disciplinary team of neutral experts to evaluate H's case and to recommend an appropriate visitation schedule. The guardian from an early point in her service [18] has consistently championed this step. In our order of May 29, 1987, we expressed our confidence that the trial court would consider the use of a court-appointed expert. Now, before us in oral argument, Foretich announced that he no longer opposed the creation of such a team.

We take no firm position on this alternative or other surfacing issues not yet the subject of an appeal. But time moves on as the impasse continues. Morgan cites to us cases for the proposition that when civil coercion fails to serve its coercive purpose, a contemnor must be

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[17] J. BARTLETT, FAMILIAR QUOTATIONS 925 (15th ed. 1980).

[18] The guardian was appointed on August 22, 1986, subsequent to the August 1986 contempt proceedings. Her first recommendation proposing a team of neutral experts was filed on October 14, 1986.

We take this occasion to thank the guardian for continuing to undertake this difficult assignment and for the assistance she has provided to date to both the trial court and this court in dealing with the complex legal and factual issues in this litigation.

released, *e.g.*, *Lambert v. Montana*, 545 F.2d 87 (9th Cir.1976); *In re Cocilovo*, 618 F.Supp. 1378 (S.D.N.Y. 1985), an argument to be first addressed to the trial court. The long-term custody and visitation questions remain unresolved, apparently in suspension pending the outcome of this appeal and perhaps other matters. The trial court faces the completion of findings on difficult factual issues, which may include a determination of the causes and extent of any physical or emotional stresses borne by H. The now lengthy rupture in the gradually increasing visitations of H and her father, the apparent object of the trial court's 1987 rulings, seems to change the practical picture facing the court. The Fourth Circuit has recently handed down a decision in a related jury trial proceeding between the parties in the Virginia federal courts holding that the district court had erroneously refused to admit certain evidence probative of possible abuse by Foretich both of H and of another daughter. *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988). The relevance if any, of that decision and of the other matters mentioned above to further proceedings in the case in our jurisdiction, including a possible reopening of hearings, remains for consideration by the trial court.[19]

Probably neither our courts nor any courts anywhere in the world can deal in a perfect way with matters so intimately linked to a family unit formed and dissolved. We can but try. The little girl H grows older day by day. It is she, first and foremost, to whom the courts must seek to render justice as the process moves on.

That portion of the order below forfeiting Morgan's security is reversed. In all other respects, the orders appealed from are affirmed.

SO ORDERED.

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[19] See notes 3, 9 and 12, *supra*. It is a valid question what, if anything, further should or can effectively be done as long as H remains secreted in defiance of court order.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 86-1137

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

Argued Nov. 18, 1986

Decided June 30, 1987

Before MACK, BELSON and STEADMAN, Associate Judges.

STEADMAN, Associate Judge:

In *Morgan v. Foretich*, 521 A.2d 248 (D.C.1987) [*Morgan I*], we recognized the qualified due process right of a civil contemnor facing incarceration to a public hearing in a child custody and visitation rights dispute. We remanded the record to have the trial court reassess its decision to close a civil contempt hearing in light of our opinion. Today, we hold that the findings made by the trial court in response to our opinion are adequate to permit appellate review and to support its decision to close the hearing. In addition, we decide the remaining issues that we held in abeyance pending resolution of the closure issue. We now affirm.

I.

In *Morgan I*, we directed the trial court to make specific findings weighing the qualified due process right of

appellant, Morgan, to an open hearing against the best interests and possible privacy interests of the child, H., and the reputational or other interests of the appellee, Foretich, who opposed an open hearing. In response, the trial court made findings on February 12, 1987 which reaffirmed its August 5, 1986 oral ruling closing the hearing.

The trial court primarily relied on a finding that an open hearing would not have been in the best interests of the child, stating in part:

> Since the initiation of these proceedings there have been graphic descriptions of alleged acts, abuses and occurrences by and to the minor child in testimony, documents, photographs and videotapes. These allegations are highly sensitive and inextricably intertwined with every phase of these proceedings. All of this if revealed to the public would be embarrassing and damaging to the child and the child's reputation, now and in the future. To allow these allegations to be published to the world and to allow this Court to serve as a public forum on the issue of the alleged abuse at the expense of compromising this innocent child's right to privacy and freedom from notorious public scrutiny is adverse to the best interests of the child.[1]

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[1] Findings of Fact Responding to the Court of Appeals' Opinion and Order Dated February 6, 1987 (February 12, 1987), Appendix at 4. The Appendix, which is incorporated by reference into the Findings of Fact, is the trial court's order of November 26, 1986 denying the Washington Post access to the record. That order, which was not appealed by the Washington Post and was not part of the appellate record in this case, relied on essentially the same factual basis for closure as the order in this case and was issued before our opinion and remand. In the February 12 Findings of Fact, the trial court notes and we agree that the existence and content of the November 26 order should negate any inference that the trial court's February 12, 1987 findings justifying closure are a post-hoc rationalization of the August 5, 1986 oral ruling contrived to satisfy our February 6 opinion in *Morgan I*.

Additional findings of fact that are part of the sealed record on appeal contain a more graphic description of the specific allegations and evidence that appellant sought to introduce at the August 5 hearing. These findings, unlike the trial court's brief oral ruling on August 5, *see* 521 A.2d at 249-50, sufficiently state the factual basis of the trial court's decision to permit appellate review. While not every child in an abuse case needs such protection nor is complete closure necessarily the only remedy, we take no issue with the trial court's determination that on the facts presented here, an open hearing on appellant's proffered evidence on August 5 would have been adverse to the best interests of the child and that based on appellant's proffered evidence, there was no acceptable alternative to closure. Furthermore, in this case, this factor alone could outweigh appellant's qualified due process right to an open hearing. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982) (under stricter standard applicable in criminal cases, closure can be ordered if necessary to protect a minor sex crime victim).[2] We have considered but are not persuaded by appellant's numerous objections to the trial court's findings. Under the standard set forth in *Morgan I*, we hold that closure of the August 5 hearing was not an abuse of discretion.[3]

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[2] The trial court also found that an open hearing would have been unfair to appellee. The August 5 hearing was solely to determine whether the contempt judgment held in abeyance should be entered. Appellee would not have been able to respond to appellant's public accusations as the trial on the abuse issue had been conducted by mutual consent in closed session and was completed on July 17. Therefore a public hearing would not have advanced the preservation of the appearance of fairness, *see Morgan I*, 521 A.2d at 251. To the contrary, it would have allowed appellant a one-sided, last ditch effort to relitigate her case. These circumstances were also an additional permissible consideration in the trial court's decision to close the hearing.

[3] In the absence of clear direction from the Supreme Court, some federal courts have reviewed trial court findings justifying closure

II.

We now consider appellant's other issues on appeal which we held in abeyance.[4] Appellant asserts various errors in the August 5 proceeding at which the July 17 judgment of contempt was entered and appellant taken into custody and in the August 15 Findings of Fact and

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orders under an abuse of discretion standard. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984) (closure of motion hearings in civil suit); *In re WFMJ Broadcasting Company*, 566 F.Supp. 1036 (N.D.Oh. 1983) (access to criminal trials under First Amendment), while others do not state the standard applied. *United States v. De Los Santos*, 810 F.2d 1326, 1334 (5th Cir. 1987) (suppression hearing properly closed; panel evaluates under the applicable test itself but also states that the trial court made adequate findings to support closure); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985) (voir dire improperly closed as trial court's findings lack specificity of overriding interest, fail to establish threat to impartial jury and fail to fully consider alternative or narrower closure: appears to be virtually de novo review). We believe that some degree of discretion should be given to the trial court's assessment of the competing interests of the parties in light of the facts and circumstances of the particular case, *see Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978); *United States v. Criden*, 675 F.2d 550, 562 (3rd Cir. 1982) (degree of discretion left open). However, in light of the constitutional due process right at stake the trial court's exercise of discretion must be carefully reviewed and supported by specific findings and articulated interests. In this case, even under a de novo review of the record, we would affirm the trial court's ruling.

[4] We noted that during the course of proceedings in this appeal, two motions to open the case for the taking of additional evidence had been filed, the disposition of which might impact, by way of mootness or otherwise, on the remaining issues in this appeal, and that as of the date of the issuance of the *Morgan I* opinion, no documents had been filed in the instant appeal concerning action on those motions. 521 A.2d at 249 n. 2. Although the file still lacks any such document, we understand that those motions were denied by the trial court and are now pending before us in a subsequent appeal in this litigation, No. 86-1615 (appeal filed December 9, 1986). We therefore see no reason to delay further in disposing of the instant appeal.

Conclusions of Law disposing of appellee's contempt and change of custody motions and appellant's motion to suspend visitation. We discuss each contention in turn.[5]

1. *Failure to Hear Proffered Evidence.* Morgan argues that she was denied due process at the August 5 proceeding when the trial court refused to consider all her proffered evidence. It is well settled that the relevancy of proposed testimony is a decision entrusted to the broad discretion of the trial judge. *Johnson v. United States*, 452 A.2d 959 (D.C.1982). The trial court noted that testimony on appellee's multiple contempt motions and Morgan's motion to suspend visitation had been taken between June 5 and July 17 and both sides had rested. Therefore, the August 5 hearing concerned only whether the judgment of contempt which had been withheld on July 17, to allow Morgan two last opportunities to permit visitation, should be entered. The trial court decided to view the portions of the proffered videotapes that concerned the child's actions during the attempted visitations on July 19 and August 1 but not to receive evidence or testimony about events that took place after the July 19 and August 1 visitation attempts or which would have relitigated issues resolved at the contempt trial less than a month previously.[6] In this instance we are not persuaded that the trial court abused its discretion in its evidentiary rulings, including the exclu-

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[5] *See Morgan I*, 521 A.2d at 249-50 for a brief statement of the facts.

[6] Specifically, appellant sought to introduce a psychological evaluation of the child performed after July 17 and videotapes made of the child subsequent to the failed visitation attempts. The trial judge also permissibly declined to hear appellant's testimony after hearing counsel's proffer that Morgan would testify to her subjective beliefs that the abuse had occurred. Appellant had testified at length in the June and July proceedings on the abuse issue and her August 5 proposed testimony would not have particularly elucidated matters at issue.

sion of evidence that was cumulative and/or not relevant to the issues presented on August 5.[7]

2. *Judgment of Contempt.* The trial court held appellant in civil contempt for refusing appellee visitation on alternating weekends from February 1986 through July 17, 1986. Appellant never appealed the underlying November 1984 and December 1985 orders requiring visitation, therefore she was under a continuing duty to comply therewith. "Noncompliance cannot be justified by seeking to establish that the judgment was improvident. Rather, justification is established only upon a showing of inability to perform or substantial performance." *Bolden v. Bolden*, 376 A.2d 430, 432 (D.C.1977). Morgan admitted that she did not turn the child over to appellee; thus, she bore the burden of establishing justification for noncompliance. *Id.* In her brief, appellant contends that the child's refusal to go, particularly on July 19 and August 1, as well as her duty to protect the child from abuse amounts to a valid justification defense. To the contrary, on the child's refusal to go, the trial court made a factual finding that "on each occasion, the [appellant] had the total capacity to release H. to [appellee] and that she chose not to do so without justification or excuse." Our review of the record does not reveal that this factual finding was clearly erroneous or without evidence to support it. D.C. Code § 17-305(a) (1981).

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[7] Appellant alternatively argues that her proffers were part of an oral motion for reconsideration based on newly discovered evidence. *Mahallati v. Williams*, 479 A.2d 300, 305 (D.C. 1984) (moving party must show that evidence is newly discovered, movant through due diligence could not have discovered evidence before lower court ruled, evidence is not merely cumulative or impeaching, evidence would have produced a different result at a new trial). In light of the length of time the matter had been at issue, the volume of expert and other testimony presented, and the short period of time since the decision, we hold that appellant then failed to meet her burden under this standard, however it may be applied to a child visitation dispute in general.

Appellant relies heavily on *Beckham v. O'Brien*, 176 Ga.App. 518, 336 S.E.2d 375 (1985), for the proposition that a mother's refusal to comply with court ordered visitation with an alleged abuser is not contemptuous. That case is distinguishable on several grounds. First, the father had been indicted on a charge of sexual molestation of the child subject to the visitation. The probable cause finding by the grand jury convinced the court that this was not a case of "simply an angry mother pointing accusingly at her ex-husband in order to avoid his visitation rights." 336 S.E.2d at 337. In the case before us, no prosecuting authority that has investigated the allegations has brought charges against appellee, and more importantly, the trial court conducted a trial on the abuse issue and contemporaneously ruled in the father's favor.

Furthermore, the Georgia court found exigent circumstances not present here, referring to the "unusually close timing of the material events." In contrast, in this case, the trial court provided ample opportunity for Morgan to try to prove her allegations of abuse before finding her in contempt. Appellant failed to do so in both the November 1985 trial from which she did not appeal an adverse ruling and in the instant case. Even after ruling against Morgan on the abuse issue on July 17 and finding sufficient basis for contempt, the trial court exercised considerable restraint by affording Morgan the opportunity to avoid judgment and incarceration by allowing her two additional opportunities to permit visitation. Furthermore, Morgan was placed in the position of violating the visitation order throughout the first half of 1986 through her own inaction rather than exigent circumstances brought on by the court's rulings. Despite the fact that appellee began filing motions for contempt as early as February 1985, Morgan did not move to have appellee's visitation rights suspended until June 5, 1986. Morgan cannot now avoid the consequences of her repeated disobedience to the court's visitation orders by

seeking refuge in the special facts of *Beckham*. The judgment of civil contempt is affirmed.

3. *Findings on the Allegations of Abuse.* Morgan contends that the trial court's findings with regard to the abuse issue were clearly erroneous. After listening to voluminous conflicting evidence from numerous witnesses and experts at this trial,[8] the trial court stated that although appellant's accusations had caused it to hesitate and pause in order to be assured that the abuse did not occur, it found that appellant had failed to prove by a preponderance of the evidence that appellee had abused the child. This court too has seriously considered appellant's arguments in its review of the record. We conclude that the trial court's resolution of conflicting testimony and the witnesses' credibility was not clearly erroneous. D.C.Code § 17-305(a) (1981); *see e.g., Cahn v. Antioch University*, 482 A.2d 120, 128 (D.C.1984).[9]

Affirmed.

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[8] This was the second trial on this issue. Morgan accused appellee of similar abuse in earlier visitations. A trial was conducted before the same trial judge in November 1985 and appellant did not appeal from an adverse verdict.

[9] Appellant also appeals a denial of her motion to compel appellee to answer certain questions posed during a deposition relating to proceedings involving appellee in another jurisdiction. It appears from the record that subsequently appellee turned over two court documents at issue and appellant's attorney was given free rein to cross-examine appellee on this subject during the hearings in this case. The cross-examination of appellee was completed without reserving any objection; therefore any error in the denial of the motion is moot.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 86-1137

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

Argued Nov. 18, 1986

Decided Feb. 6, 1987

Before MACK, BELSON and STEADMAN, Associate Judges.

STEADMAN, Associate Judge:

This appeal arises out of a bitter and litigious child custody and visitation rights dispute. Custody was originally granted to appellant, Elizabeth Morgan, the mother, while appellee, Eric Foretich, the father, was awarded liberal visitation. After an extended period of conflict over visitation and charges against appellee of sexual abuse, the trial court granted appellee's motions for civil contempt against Morgan and ordered her incarcerated for refusing to turn the child over for visitation.[1] Appellant raises numerous issues on appeal.

[1] Appellant was released by this court by order of August 7 pending the outcome of this appeal. All the terms and conditions of that order, including the bond, passport custody, and travel restrictions, continue in full force and remain unaffected by this opinion and remand of the record.

For the purposes of this opinion we need decide only one: Whether the trial court violated appellant's due process rights under the Fifth Amendment in refusing to grant appellant's request to open to the public the final hearing at which she was ordered incarcerated.[2] We hold that the trial court did not make the specific findings that are required by the applicable case law before closing the hearing. Therefore, we remand the record to have the trial court fully articulate the basis of its decision.

I.

Since the issue before us is one of law, we set forth only those facts necessary to put the issue in perspective. The child, H., was born in 1982, after her parents had already separated. On November 8, 1984, Morgan was awarded custody and Foretich given liberal visitation. At that time, the trial court also granted the first of many protective orders that have sealed all the trial proceedings and records in this case.

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[2] The other issues raised by appellant are: 1) whether appellant was deprived of due process at the August 5, 1986 proceeding because the trial court declined to consider all the evidence proffered by appellant; 2) whether the trial court's finding of civil contempt was clearly erroneous; 3) whether the trial court's finding with regard to sexual abuse was clearly erroneous; and 4) whether the trial court erred in refusing to compel discovery. We hold these issues in abeyance at this time. Appellant filed in this court two motions to remand the case to the trial court for the purpose of taking additional evidence. One was filed on October 3, 1986, and the second on November 10, 1986. In our order of November 17, 1986, we indicated that these motions were best directed to the trial court under *Smith v. Pollin*, 90 U.S.App.D.C. 178, 194 F.2d 349 (1952), and observed that disposition of the motions might impact, by way of mootness or otherwise, on these other issues raised in this appeal. No documents have been filed in the instant appeal concerning action on these motions. Another separate appeal (No. 86-1615) is pending before this court from a trial court order dated December 8, 1986, which may involve disposition of these or like motions. The record on that appeal, however, is still incomplete. Hence, this opinion deals only with the issue of a public hearing.

Beginning in January 1985, appellant began to make accusations that appellee was sexually abusing H. during visitation. Further litigation ensued but appellee retained visitation rights. Appellee's last visit with H. prior to the summer contempt proceedings took place in February 1986. After the February visit, Foretich alleged that appellant repeatedly refused to turn the child over to him for his court ordered visitation. He therefore filed multiple motions to have Morgan held in contempt. Hearings were held in June and July of 1986 on several motions, including Foretich's motions for contempt and change of custody and Morgan's motions for temporary suspension of visitation and to compel discovery. On July 17, the trial judge orally announced his findings of fact and conclusions of law. He found that appellant had disobeyed the visitation orders without lawful justification or excuse, but withheld judgment of contempt contingent upon her turning over the child for visitation on July 19.[3]

The next hearing, held on August 5, 1986, was to determine whether the court should enter the judgment of contempt which had been held in abeyance on July 17. Appellant stated that H. had not been turned over to appellee on July 19 and proffered to the court evidence that she felt would support a justification defense. Appellant then requested that the courtroom be opened stating that, "inasmuch as she is entitled to a public trial, inasmuch as any person subject to incarceration would be entitled to . . . and that right supersedes the interest in maintaining this in a closed fashion." The court denied the request, stating:

> But I think based upon everything I am aware that this is totally an inappropriate time to open this matter in consideration with everything going for-

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[3] The court also denied the motions for change of custody and temporary suspension of visitation.

> ward, parties litigating behind closed doors, because all anyone would be seeing is this last one effort on the part of Dr. Morgan to demonstrate to me that the child could not have been turned over or should not have been turned over. I think your request is totally unfair to all the parties involved, so your request will be denied at this time. . . .

The court reserved the possibility that future hearings in this case could be open to the public and that the entire file might be opened at a later date.[4]

II.

Appellant claims that a defendant in a civil contempt proceeding has a Fifth Amendment due process right to a public trial relying on *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L.Ed. 682 (1948). Appellee first makes three technical objections before addressing appellant's public hearing argument: 1) the issue was not preserved because Morgan never appealed from the August 6 written order that appellee alleges confirmed the closure the previous day;[5] 2) appellant waived whatever right to an open hearing may exist by failing to assert it at the beginning of the hearings on the contempt motions in June;[6] and 3) irrespective of any theoretical right, D.C.

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[4] This is the entire record concerning Morgan's attempt to open the proceedings. Appellant did not give the court advance notice of her request nor submit any memoranda or case law to support her argument at the hearing. Therefore, despite our ultimate conclusion that the trial judge did not make the required findings, we imply no criticism of the trial judge's performance. To the contrary, it appears to us at this juncture that he had handled a difficult case with skill and impartiality.

[5] Appellant filed notices of appeal on August 5 as well as from the August 15 written findings and conclusions of law. Appellant had objected to closure at the August 5th hearing. The issue is properly before us.

[6] In *Levine v. United States*, 362 U.S. 610, 618, 80 S.Ct. 1038, 1043, 4 L.Ed.2d 989 (1960), Justice Frankfurter wrote with respect to a grand jury witness:

Code § 16-2344 (1981), required that the trial court close the hearing.[7] Appellee also contends that the constitu-

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> Having refused to answer each question in turn, and having resolved not to answer at all, petitioner then might well have insisted that, as summary punishment was to be imposed, the courtroom be opened so that the act of contempt, that is, his definitive refusal to comply with the court's direction to answer the previously propounded questions, and that the consequent adjudication and sentence might occur in public.

If some part of the right remains until that moment when the final act of contempt is complete and judgment is about to be entered, Morgan must have retained the right to object at the beginning of the August 5 hearing, as the proceedings had not yet reached that point. We see no reason, however, why Morgan's delay could not be taken into consideration as one relevant factor, as indicated in the trial court's explanation quoted above, for denying the August 5 request. However, we note that Morgan sought to have more than her last act of defiance held in open court. She sought to introduce evidence that she believed would justify her refusal to turn over the child. As appellant did not renew her request to open the hearing at the moment when "summary punishment was to be imposed," the *Levine* issue is not before us today.

[7] Section 16-2344 provides:

> Upon trial of a proceeding over which the [Family] Division has jurisdiction under paragraph (3), (4), (10) or (11) of Section 11-1101, the court may exclude the general public and *at the request of either party, shall exclude the general public.* (Emphasis added.)

D.C.Code § 11-1101(4) (1981) gives exclusive jurisdiction to the Family Division over "actions seeking custody of minor children. . . ." Appellee cited § 16-2344 in his motion for closure back in November 1984. The trial court granted the motion relying on "the authorities cited in appellee's motion." Since then, the trial court has granted his requests for closure and Morgan has acceded to his requests. Therefore he contends that closure was based on his original assertion of § 16-2344, as these hearings concerned both the motions for contempt and Foretich's motion for custody and Morgan's motion to suspend visitation, the latter motions falling within the scope of proceedings covered by § 16-2344. (We will assume that appellee correctly interprets the scope of § 16-2344.)

However, the trial judge did not refer to § 16-2344 in his oral ruling. He seems to have approached the issue as a fairness in-

tional right to a public trial in criminal cases does not apply in child custody civil suits and that alternatively the closure of the hearing was consistent with the fairness interests normally protected by public trials and compelled by the need to protect the child. Since appellee's technical arguments will be effectively mooted if the hearing had been properly closed, we concentrate directly on the constitutional issues.

III.

We hold that a civil, as well as a criminal, contemnor has a qualified right not to be incarcerated in a secret proceeding. In *In re Oliver, supra,* a grand jury witness was summarily held in criminal contempt and sentenced in a secret proceeding. The Supreme Court held:

> In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Id. 333 U.S. at 273, 68 S.Ct. at 507. Appellant relies on footnote 13 in *In re Oliver,* 333 U.S. at 266, 68 S.Ct. at 504, which suggests that the distinction between civil and criminal contempt is "not material in resolving the due process question." The Second Circuit came to the

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quiry, requiring a balancing test. In Part III, we will hold that the trial court did not sufficiently articulate the interests at stake or make the specific findings necessary for appellate review. Therefore, we need not reach the statutory issue. If upon remand, the trial court relies in whole or in part on § 16-2344, then the constitutionality of that section might be called into question by appellant, *see Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *In re Washington Post Co.,* 807 F.2d 383 (4th Cir. 1986), and the United States Attorney General must be notified. Super.Ct.Civ.R. 24(c); D.C.App.R. 52.

same conclusion in *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982). We are persuaded by Judge Mansfield's testimony. He stated:

> While the passages quoted from *In re Oliver* [8] were written primarily with criminal trials in mind, it is significant that the contempt sentence overturned by the *Oliver* Court on the ground that the contempt proceeding below had been improperly closed to the public was a conditional jail sentence that would have terminated upon compliance with the trial court's order. Accordingly, the *Oliver* analysis was applied to invalidate a contempt sanction whose central characteristic—its conditional nature—is typical of a *civil* contempt. See *United States v. Wendy*, 575 F.2d 1025, 1029 n. 13 (2d Cir.1978) (discussing distinction between civil and criminal contempt).

Id. at 696 (emphasis in original). Furthermore the policy considerations are the same:

> Given the burden that imprisonment imposes on an individual, a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system.

Id. at 697. The *Rosahn* opinion also notes that the conclusion that civil contemnors like criminal contemnors have some right to a public proceeding is consistent with the trend in federal courts to "afford the same or similar procedural safeguards to persons charged with civil contempt as to those charged with criminal contempt." *Id.* at 697.

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[8] The passages referred to include the one quoted *supra*.

Although we conclude that a civil contemnor has a Fifth Amendment due process right to a public hearing, as appellant concedes, such a right is not absolute. She argues, however, that as in cases under the First and Sixth Amendments that guarantee open proceedings to defendants and the press in criminal cases, there is a presumption of openness which

> may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984);[9] *see also Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 581, and n. 18, 100 S.Ct. 2814, 2829, and n. 18, 65 L.Ed.2d 973 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09, 102 S.Ct. 2613, 2620-21, 73 L.Ed.2d 248 (1982) (First Amendment); *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216, 81 L.Ed. 2d 31 (1984) (Sixth Amendment) ("the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no

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[9] In *Press-Enterprise* the Supreme Court held that the guarantee of open proceedings in criminal trials covers the voir dire examination of potential jurors. The defendant and the state favored closure, while petitioner, a member of the media, requested access. Interestingly, the majority opinion does not explicitly rely on the First Amendment, rather it seems to rest on historical practice (or possibly the Sixth Amendment). Nevertheless, the majority does cite *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), which is clearly a First Amendment case, as authority. *Globe Newspaper* held that the press and public have a qualified right to attend criminal trials, overturning a Massachusetts statute that mandated that all trials involving minor victims of sex crimes be closed.

broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure").

We hold, however, that the presumption of openness and the standard for closure that apply in criminal cases, where the constitutional threshold for closure is highest, do not apply to the evidentiary phase of a civil contempt hearing in a child custody and visitation rights case.[10] A less stringent standard is applicable to the instant case.

We base this conclusion in part on the fact that Family Division proceedings do not have the same tradition of openness as criminal or non-family civil cases.[11] For example, until the passage of the Matrimonial Causes Act of 1857, exclusive jurisdiction in England over marriage and divorce was in the ecclesiastical courts. H. CLARK,

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[10] We note that we write on a clean slate. The public hearing right for contemnors arising under the Fifth Amendment was recognized by the Supreme Court in the context of a grand jury inquiry, a proceeding where there is no presumption of openness; to the contrary, grand juries have historically been closed. Therefore the defendant-witness has no right to have the grand jury questions read in public, only the summary trial and sentencing can be held in open court. *Levine v. United States, supra,* 362 U.S. at 618, 80 S.Ct. at 1043; *In re Oliver, supra.* In this case, for the first time, a contemnor seeks to publically assert a substantive defense in a proceeding other than one with a tradition of complete secrecy.

[11] Several federal circuits have extended the strict standard to First Amendment claims for access to civil cases relying on Supreme Court dicta in *Richmond Newspapers, Inc.* that "historically both civil and criminal trials have been presumptively open." 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17. *See Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059 (3rd Cir. 1984); *Westmoreland v. Columbia Broadcasting System,* 752 F.2d 16, 23 (2d Cir. 1984). These cases are inapposite here, and we take no position on them. *See* note 12 *infra.* Although technically classified as civil cases, family proceedings do not have the same historical presumption of openness as discussed above.

Law of Domestic Relations 281-82 (1968). In these courts it appears that witnesses were often deposed in private. *C. v. C.*, 320 A.2d 717, 726-27 (Del.1974); 3 W. BLACKSTONE *Commentaries* 373. That approach, though modified by constitutional protections and the absorption of domestic relations into the common law courts, has been extended in this country. *See* Unif. Marriage and Divorce Act § 406(c) 9A U.L.A. 206 (1973) (court may exclude public from a custody hearing); Annotation, *Propriety of Exclusion of Press and Public or Other Media Representatives from Civil Trial*, 79 A.L.R.3d 401, 405-07 (1977) (in divorce proceedings trial judge has inherent power to exclude the press if their presence would interfere with the proper administration of justice); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978) (approving the proposition that common law right of inspection of court records bows before power of court to insure that its records are not used to gratify private spite or promote public scandal in divorce suits). This rationale based on past practice is also supported by current statutory protections for minor children in these cases. Since custody and visitation rights determinations are based on an analysis of "the best interests of the child," and since the evidentiary phase of civil contempt proceedings adjudicating violation of visitation orders necessarily implicates the child's interests, a presumption of openness would be inappropriate.

Thus we conclude that the presumption of openness that underlies the *Press-Enterprise* standard does not attach to the evidentiary phase of a civil contempt hearing in a child custody and visitation rights case. Openness or closure must be determined on a case by case basis with no presumption attaching to either. The trial court must balance the qualified due process right of the contemnor to an open civil contempt proceeding against the best interests and possible privacy rights of the child

and the reputational or other interests of those opposing an open hearing.[12]

Although we hold that it would be inappropriate to apply a test as stringent as that enumerated in *Press-Enterprise* in the instant case, we also conclude that the trial judge should have recognized appellant's limited right to have an open hearing and weighed that right against the interests of the child and appellee as indicated above, and made explicit findings supporting his ruling. We therefore remand the record so that the trial court may consider his decision to close the August 5 hearing in light of the competing interests involved and make findings specific enough for us to determine how he weighed the interests of appellant, appellee, and the child in the context of the qualified constitutional right of a civil contemnor to a public hearing that we recognize today.

While this procedure might be criticized for permitting the trial court to construct a *post hoc* rationalization to support its original ruling, we do so here because our examination suggests that the record would support closure in this case [13] under even the strict *Press-Enterprise* standard advocated by appellant. *See Globe Newspaper Co. v. Superior Court*, *supra* (on a case-by-case basis,

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[12] We emphasize that our holding is limited to the evidentiary phase of a civil contempt proceeding in the Family Division. We are not presented with other proceedings in the Family Division not involving the potential for incarceration of one of the parties. Nor are we presented with the question of openness or closure in civil contempt proceedings outside the Family Division.

[13] By closure we refer to closure of the proffer and presentation of evidence and argument by counsel on the substantive issues concerning contempt. The right to have the final act of defiance and order of incarceration held in open court, discussed in *Levine*, *supra*, may be closer to an absolute right and closure of that part of a contempt hearing might be governed by a stricter standard. We mention again that appellant did not renew her request when the August 5 proceedings reached this point.

trial courts may determine that closure is necessary to protect the physical and mental well-being of a minor sex crime victim). We conclude, however, that in light of the Supreme Court's insistence on articulated interests and specific findings, most recently in *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, —— U.S. ——, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), it is inadvisable for such a conclusion to remain only implicit in the record.[14]

Accordingly, the record on appeal is remanded to the trial court for action consistent with this opinion.

So ordered.

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[14] We note, however, that in an analogous case at least one federal circuit came to a contrary conclusion. *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983) (failure of the trial court to give a member of the media a hearing and make findings in a civil contempt suit closed because it involved trade secrets held to be harmless error; panel evaluates the trade secret question itself and decides there were no alternatives to closure and therefore no need to remand the case).

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 86-1615, 87-33, 87-936, 87-942 and 87-987

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

Filed Apr. 22, 1988

BEFORE: Mack, Belson and Steadman, Associate Judges.

ORDER

On consideration of the motion of the Washington Post to intervene in these consolidated appeals for the limited purpose of seeking access to the record on appeal, it is

ORDERED that the motion to intervene is granted. *Mokhiber v. Davis*, 537 A. 2d 1100 (D.C. 1988). It is

FURTHER ORDERED that upon intervenor's further motion, the briefs filed in this court shall be redacted to reflect considerations of privacy and fairness (*see Morgan v. Foretich*, 521 A. 2d 248, 528 A. 2d 425 (D.C. 1987); *Mokhiber v. Davis*, *supra*; and relevant trial court orders) and shall then be made available, as well as this court's docket entries. It is

FURTHER ORDERED that a decision on the request for access to trial court transcripts and documents is held in abeyance pending determination of any appeal from the trial court's actions with respect thereto.

PER CURIAM

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DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 86-1615, 87-33, 87-936, 87-942 and 87-987

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

[Filed Aug. 30, 1988]

BEFORE; MACK, BELSON, and STEADMAN, Associate Judges.

ORDER

On consideration of the motion of appellant for stay of mandate, it is

ORDERED that the motion is denied and the Clerk is directed to issue the mandate forthwith.

PER CURIAM

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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
DOMESTIC RELATIONS BRANCH
Family Division

Civil Action No. D 684-83

JEAN ELIZABETH MORGAN,
Plaintiff,

v.

ERIC A. FORETICH,
Defendant.

[Filed Nov. 8, 1984]

ORDER

Upon consideration of the defendant's Motion for Protective Order and the Exclusion of Press or Other Media Representatives and the General Public from the Trial and Other Proceedings, filed in writing prior to the trial in this case, and the defendant's motion to seal the entire record made orally on the first day of trial, and the authorities cited by the defendant in support thereof, and for the reasons stated by the Court at the outset of the proceedings in its ruling *pendente lite* granting the defendant's motion for protective order, exclusion, and sealing, and because the Court finds that it would be contrary to the best interest of the child, Hilary Antonia Foretich, for the record of these proceedings not to be kept secret, and for good cause and in the exercise of this Court's sound discretion, it is hereby

ORDERED: that the defendant's Motion for Protective Order, Exclusion of the Press and the Public from the Trial and Other Proceedings, and the defendant's motion to seal the entire record, be and hereby is granted, and it is further

ORDERED: that the Clerk of the Court shall seal the court file in this case and restrict access to the file to everyone except the parties, their counsel, and the Court.

SO ORDERED this 8th day of November, 1984.

/s/ Bruce S. Mencher
BRUCE S. MENCHER, Judge

Copies to:

Hal Witt, Esquire
John C. Lenahan, Esquire

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Family Division

C.A. No. D-684-83

JEAN ELIZABETH MORGAN,
Plaintiff,

v.

ERIC A. FORETICH,
Defendant.

[Filed Nov. 26, 1986]

MEMORANDUM OPINION AND ORDER

I.

This matter comes before the Court upon the Motion of the Washington Post Company ("the Post") to intervene in this case for the limited purpose of asserting its claimed First Amendment and common law rights to attend the proceedings and to secure access to relevant pleadings and records. The motion seeks not only to open all future proceedings to the public, but also to unseal approximately two years of records, documents, proceedings, and testimony. At issue in this case is a long-standing dispute between the plaintiff, Jean Elizabeth Morgan, and the defendant, Eric A. Foretich, regarding both custody of and the Defendant's visitation rights with a minor child of the parties.

In its Memorandum and Supplemental Memorandum of Points and Authorities in Support of the motion, the Post argues that intervention and access to the record and proceedings in this case are appropriate because

(1) the public and the press have a First Amendment right of access to these proceedings, (2) the public and the press have a common law right of access to these proceedings, (3) that there is no compelling justification for denying the public's right of access to these proceedings, and (4) that the public has a particularly strong interest in attending proceedings that may result in imprisonment for contempt. In short, the Post argues that the Court's protective order of November 8, 1984, excluding the press or other media representatives and the general public from the trial and other proceedings in this case, does not satisfy the requirements of the First Amendment and common law, and that the order does not justify closure of any hearings in this case—in particular a hearing that raises even the possibility of contempt and imprisonment.

In consideration of the Plaintiff's Response in Support of and the Defendant's and Guardian ad Litem's Responses in Opposition to the Post's motion, and based on the record herein, the Court concludes that the Post's motion to intervene and for access should be DENIED.

The Court proceedings herein have been closed to the public and the press, and the record has been sealed since 1984. The authority of the Court to close such proceedings is found in D.C. Code § 16-2344, which provides in pertinent part:

> Upon trial or proceedings over which the Family Division of the Superior Court has jurisdiction under paragraph (3), (4), (10) or (11) of Section 11-1101, the Court may exclude the general public and, at the request of either party, shall exclude the general public.

D.C. Code § 11-1101(4) gives exclusive jurisdiction to the Family Division of the Superior Court over "actions seeking custody of minor children . . ." as well as other matters that are presently and will continue to be before this Court.

On several occasions since the beginning of the proceedings in this case,[1] the Court has issued written orders closing the proceedings and the record herein pursuant to D.C. Code § 16-2344. In the Court's order dated November 8, 1984, Judge Bruce S. Mencher granted the Defendant's Motion for Protective Order, Exclusion of Press and Public from the Trial and Other Proceedings and the Defendant's Motion to Seal the Entire Record. Since that ruling, all records, documents, testimony, pleadings and evidence have been sealed, and all proceedings have been closed pursuant to the Court's authority under D.C. Code § 16.2344.[2] Not until August 5, 1986 did the issues of opening the proceedings to the public and unsealing the record arise.[3]

The Defendant and the Guardian ad Litem in their responses to the Post's motion argue that closure is mandated by D.C. Code § 16-2344 upon their request, and necessary in order to protect the best interests of the minor child. This member of the Court agrees based on the record herein.

Since the initiation of these proceedings there have been graphic descriptions of alleged acts, abuses and occurrences by and to the minor child in testimony, docu-

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[1] November 8, 1984; December 4, 1985; July 29, 1986; August 7, 1986 and October 29, 1986.

[2] The Court notes Plaintiff's original opposition to closure at the outset of the proceedings in 1984. At no time did the Plaintiff appeal or indicate an intention to appeal Judge Mencher's Order of November 8, 1984. All counsel invoked the Order at the outset of the November 1985 proceedings before this member of the Court, and Plaintiff joined or acquiesced to subsequent Motions to Seal and Close.

[3] Previous to this date, the Court conducted closed proceedings on November 19, 20 and 21, 1985; June 5, 6, 10, 12 and 13, 1986; July 1, 2, 8, 9, 14, 15 and 17, 1986; and also met privately with counsel and the parties on two occasions in an attempt to resolve the pending issues short of litigation.

ments, photographs and videotapes. These allegations are highly sensitive and inextricably intertwined with every phase of these proceedings. All of this if revealed to the public would be embarassing and damaging to the child and the child's reputation, now and in the future. To allow these allegations to be published to the world and to allow this Court to serve as a public forum on the issue of alleged abuse at the expense of compromising this innocent child's right to privacy and freedom from notorious public scrutiny is adverse to the best interests of the child. At this time these proceedings shall remain closed and the record shall remain sealed. There appears to be no alternative to closure at this time.[4]

The Post argues that the order of November 8, 1984 can no longer serve as the Court's justification for closure of these proceedings. The Post further argues that the public has a particularly strong right of access in contempt proceeding than in other proceedings, thus subjecting closure to greater scrutiny. In the advancement of its arguments, the Post submits that the press and the public's First Amendment and common law rights of access are absolute and unconditional; *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613, 457 U.S. 596, 73 L.Ed. 2d 248 (1982); *Press-Enterprise Co. v. Superior Court*, 104 S.Ct. 819, 464 U.S. 501, 78 L.Ed. 2d 629 (1984); *Richmond Newspaper, Inc. v. Virginia*, 100 S.Ct. 2814, 448 U.S. 555, 65 L.Ed. 2d 973 (1980); and that the Court's closure of all proceedings, absent strong justification, must surrender to the public's right of access.

The Court's reading of *Globe*, *Press-Enterprise* and *Richmond Newspaper* is distinguishable from that of

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[4] The Court is not cognizant of any practical way that the parties can proceed and present their cases inclusive of all documents, testimony, photographs, videotapes and records by omitting and not referencing highly sensitive and nonpublic information specific to the allegations herein.

the Post. The proposition for which those cases stand involves a delicate case-by-case balancing of governmental interests against those of the public to seek access. Even in criminal trials where the constitutional threshold for closure is at its highest, trial courts have the discretion to determine on a case-by-case basis whether closure is necessary to protect a minor victim. *Globe Newspaper, Co. v. Superior Court*, 457 U.S. 596, 608 (1982). Neither the First Amendment right of access nor the common law right of access is absolute.

The Court concludes that, in the context of this case, the need to protect the child's right to privacy and freedom from notorious public scrutiny as a result of the allegations herein is of utmost importance and significance. This Court's justification for closure is not only a compelling interest, but also one which is stated with the "requisite specificity" needed to support exclusion of the public from these proceedings. See *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 513 (1984). Therefore, even if *Globe* and other cases cited by the Post are controlling, this Court has stated its jusitfication for closure notwithstanding the order of November 8, 1984.

The Post further argues that if not the entire proceeding, then the portions which pertain to contempt should be opened because of the importance of the case.[5] In other words, the Post would be satisfied with just parts of the record. Considering the advanced stage of these proceedings, the Post's willingness to settle for parts of the recent record causes this member of the Court to wonder if the motion is based upon a genuine assertion of First Amendment or common law rights to be present at proceedings in order to report to the public, or extreme curiosity geared toward sensational-

[5] In support of its claim of the importance of these proceedings, the Post cites its own publication of August 26, 1986 that "the Morgan-Foretich battle has become a symbol for both feminists and fathers' rights groups."

ism. As stated by the Supreme Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978):

> Every Court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce.' In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893), Accord. e.g., C. v. C., 320, A.2d 717, 723, 727 (Del. 1974).

II.

At a hearing on October 29, 1986, plaintiff and her counsel claimed that the orders closing these proceedings and sealing the record are so vague that they have no idea what conduct on their part is prohibited, and requested the Court to specify the restrictions imposed upon the parties. In response to that request the parties and counsel are advised that if they should discuss these proceedings with the press, the media or the general public, they shall not reveal nor shall they publish or produce in any manner or fashion any of the following relating to the child. First, no mention may be made with regard to the child's name, age, sex and address. Second, no mention may be made of the school or day care (past, present or future) that the child may attend, the religious institution with which the child may be affiliated, or whether there are any siblings. Third, specific contents of documents, medical records, records of proceedings, records of testimony, records of evidence, photographs, videotapes, and images of the minor child or this case are strictly prohibited from discussion, production and publication. And finally, no mention may be made of any specific act alleged to have been committed by or upon the child. The most descriptive word

which may be used is "abuse," without reference to a particular kind of abuse such as physical, mental, psychological or sexual.[6]

The Court is not blind to the fact that some of the above details may already have been disclosed in one form or another. If such a revelation has occurred, it will not dissuade this Court from preventing future disclosure not in the best interests of the child. Upon the request of any party, the Court will reconsider any restriction specified by this order if it is overly burdensome or not necessary for protection of the child's welfare.

Therefore, it is by the Court this 26th day of November, 1986

ORDERED, that the Washington Post's Motion to Intervene and for Access shall be and is hereby denied,[7] and it is further

ORDERED, that the parties shall restrict their outside discussions and disclosures concerning the minor child in this case in accordance with this order.

/s/ Herbert B. Dixon, Jr.
HERBERT B. DIXON, JR.
Judge
(Signed in Chambers)

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[6] The Court will not attempt to restrict the parties in terms of information they choose to reveal concerning themselves; however, every effort will be made to restrict other information the public can use to notoriously identify the child, now or in the future.

[7] By an order dated November 17, 1986, the D.C. Court of Appeals denied a motion by the Post to intervene in the appellate proceedings and took under advisement the Post's motion for access to appellate briefs.

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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
FAMILY DIVISION

C.A. No. D-684-83

JEAN ELIZABETH MORGAN,
Defendant

v.

ERIC A. FORETICH,
Plaintiff

ORDER AMENDING PUBLIC DISCLOSURE RESTRICTIONS

In accordance with the oral ruling from the bench on April 6, 1987, counsel and all parties herein are relieved of certain restrictions discussed in the court's memorandum opinion and order dated November 26, 1986, with regard to information and details concerning the proceedings herein. The full scope of the prior sealing orders for future hearings is no longer necessary for the protection of child's welfare.[1]

Therefore, notwithstanding previous orders sealing the record herein, it is this 13th day of April, 1987

ORDERED:

1. That should the parties or counsel discuss these proceedings with the press, the media or the general public, mention may be made of the child's name, age, sex and other biographical information, including identification of siblings. Moreover, reference may be made

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[1] Indeed, some of the restrictions proved cumbersome for the parties and counsel to maintain their discussions and presentations during public court proceedings.

to the terms physical, mental, psychological, sexual or other types of abuse, provided no mention may be made of any specific sex abuse allegation.

2. Prior to any reference in court to a specific sex abuse allegation, counsel shall discuss the matter at the bench so as to allow a determination if the hearing should be closed. Similarly, all witnesses shall be instructed to advise the court before giving testimony regarding a specific sex abuse allegation so as to allow the court to determine if the hearing should be closed.

3. There shall be no discussion, production or publication of documents, medical records, records of proceedings, records of testimony, records of evidence, photographs, videotapes, recordings or images exceeding the above-permitted disclosures.

/s/ Herbert B. Dixon, Jr.
HERBERT B. DIXON, JR.
Judge
(Signed in Chambers)

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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
FAMILY DIVISION

C.A. No. D-684-83

JEAN ELIZABETH MORGAN,
Plaintiff

v.

ERIC A. FORETICH,
Defendant

[Filed Apr. 15, 1988]

MEMORANDUM OPINION AND ORDER

(Denying Access to Documents and Exhibits;
Granting Access to Clerk's Record of Docket
Entries and Transcripts of Public Proceedings)

On October 29, 1986, the Washington Post filed a motion to intervene in this case for the limited purpose of asserting its claimed First Amendment and common law rights to attend the proceedings and secure access to relevant pleadings and records. The motion was denied by Memorandum Opinion and Order dated November 26, 1986. Subsequently, the Post filed a motion for reconsideration of the denial. Said motion was orally denied from the bench on December 2, 1986.[1] This matter is now before the court on a second motion by the Post

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[1] This court is informed that the Washington Post did not appeal the denial of its motion. *See Morgan v. Foretich*, 528 A.2d 425, 426 n.1 [*Morgan II*].

filed March 23, 1988, bearing a caption identical to its 1986 motion.

The Post argues that keeping the record under seal in this case no longer serves the purpose of preventing the public and the press from learning the details of the allegations that have been made in this case, and that maintaining the seal serves to prevent the public from understanding how the issues in this case have been addressed and resolved by the court. At least, argues the Post, the record should be unsealed insofar as it pertains to the contempt proceedings and the motion for recusal.

The plaintiff, Morgan, argues in support of the Post's motion that the entire record, past and future, should be unsealed. The defendant, Foretich, opposes any further opening of these proceedings, to protect his and the child's privacy rights, beyond the balance which the court struck by its order dated April 13, 1987, amending public disclosure restrictions. The guardian opposes any further unsealing of the record and urges this court to recognize its obligation to protect the privacy of the child from the public airing of accusations by the parties which would be damaging to the child, now and in the future.

At a hearing on its motion for reconsideration in December 1986, the Post declined the opportunity for unlimited access to the record and proceedings conditioned on its adherence to the public disclosure restrictions then imposed on the parties and counsel. At hearing on the instant motion in April 1988, the Post declined the same opportunity notwithstanding the substantial lessening of restrictions as a result of the court's April 1987 order. Essentially, the referenced order restricts public disclosure of specific sex abuse allegations in this proceeding of documents, records or images concerning same.

The Post argues against any restriction. It asserts that detailed testimony concerning the allegations of sexual abuse made in this case were made in February

1987 during a public civil trial involving the parties in the United States District Court for the Eastern District of Virginia. The public knows, argues the Post, that Morgan has made allegations of sexual abuse against her former husband, Foretich, and that her claims of sexual abuse are the reasons for her refusal to comply with the court's visitation orders. The public has been prevented from observing just how Morgan's claims have been addressed by the court and opening the record in this case would do a great deal to assure the public that justice is being carried out. The Post takes the position that "[u]nsealing the record in this case would do little to harm the minor child—the public has heard that she may have been the victim of sexual abuse, and even if details were published little additional harm [to the child] is likely to result." [2]

This court does not accept the proposition that keeping the record of these proceedings under seal no longer serves a valid purpose in light of the public trial to which the Post refers. The Post asserts that its reporters were present for the entire public trial, have obtained a complete transcript of same, and have exercised a responsible degree of journalistic restraint in the details reported thus far.[3]

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[2] Motion of the Washington Post Company to Intervene and for Access, Exh. B, p. 15.

[3] Notwithstanding the degree of restraint in reporting details of allegations, articles in the February 18, 19 and 21, 1987, editions of the Washington Post are illustrative. The February 18 article summarizes certain arguments of counsel and testimony of witnesses; the referenced article notes that one of the witnesses in that proceeding "was not heard by Judge Herbert Dixon in the District custody case," and further proclaims that the Virginia trial "is expected to provide the first public accounting from the two sides on the allegations of sexual abuse." *See* Page B7. The February 19 and 21 articles also summarize arguments and testimony in the Virginia trial which, according to both articles, stems from a bitter custody battle between Morgan and Foretich in D.C. Superior Court. *See* Pages C6 and B8, respectively.

It does not require a mischievous mind to envision a reporter, journalist or John Doe publicly disseminating a comparison of the detailed allegations in both proceedings—such would do nothing to enhance the public's understanding how the issues in this case have been addressed, but would be detrimental to the child's privacy, now and in the future. Indeed, this court has heard testimony that the sensationalism surrounding the initial publicity given this case resulted in a directive to the faculty at the child's preschool which dissuaded discussions with the child about her life. Because of this, normal roles one would expect of preschool teachers apparently went unfulfilled, e.g., friend, counselor, substitute parent.

The fact that this court is considering this motion by the Washington Post which is essentially identical to its motion denied sixteen (16) months earlier is not to suggest there has been a diminution of the child's privacy rights; however, in light of the lessening of public disclosure restrictions by this court's April 1987 order and in view of *Mokhiber v. Davis*, No. 86-89, —— A.2d —— (D.C. Feb. 17, 1988), this court is constrained to reevaluate its decision to close certain proceedings and maintain the record under seal.

Mokhiber involved the research efforts by an investigative reporter which led him to seek access to sealed records of certain civil litigation. The court held that Mr. Mokhiber, as a member of the public, enjoys a common law presumptive right of access to certain categories of the sealed records [4] and is entitled to intervene to challenge the seals placed on the various records to which he has a presumptive right of access.[5] In addition, the court noted "that a civil contempt hearing in a child custody case also presents special concerns that justify

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[4] *Mokhiber*, slip op. at 16.

[5] *Mokhiber*, slip op. at 27.

closure to the public on a less stringent standard than might usually apply to hearings in civil cases." [6]

Mokhiber is instructive as to how this court should exercise its discretion in these proceedings to evaluate the claims for and against disclosure by the Post, Morgan, Foretich, and the guardian.[7] The issues are:

1. Whether the prior reasons for sealing the record are no longer valid,
2. Whether the present interest in maintaining the seal is simply weaker than the public interest in disclosure, and
3. Whether the April 1987 order amending public disclosure restrictions requires the unsealing of records not inconsistent with said order.

There appears to be no issue surrounding the validity of this court's previous sealing orders, at least through August 1986. *See Morgan I*, 521 A.2d at 253; *Morgan II*, 528 A.2d at 426-27. The Post argues that, whatever the validity of the prior sealing orders, no purpose is served by continued sealing of the record based on subsequent disclosures, generally, and specifically with respect to testimony in open court by the parties and witnesses in the Eastern District of Virginia. The public now knows the details, so the argument goes, and continued sealing only serves to prevent the public from understanding how the issues in this case have been addressed and resolved by the court.

The argument that the public knows is not persuasive. In the six sample pages of testimony from the federal court trial submitted by the Post with its motion, the court notes specific testimony which did not occur by a

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[6] *Mokhiber*, slip op. at 32, n.13 (citing *Morgan v. Foretich*, 521 A.2d 248 (D.C. Cir. 1987) [Morgan I]).

[7] *See Mokhiber*, slip op. at 35.

witness, party or both who testified in this proceeding.[8] Notwithstanding the extent to which the Post may have exercised journalistic restraint in its reporting of details in its possession, the unsealing of the records presents too much of an opportunity for mischief by those less responsible, all to the detriment of the child, now and in the future.

The Post argues that the present sealing only serves to prevent the public from understanding how the issues in this case have been addressed and resolved by the court. The public interest in an issue of great and wide importance may create a strong claim supporting access.[9] Whatever the underlying issues herein, their significance have become entangled with and indistinguishable from the acrimony of the litigation and resulting court orders. Therefore, it is not necessary for this court to determine whether a claimed significant issue of public importance is the underlying dispute or the judicial system's conduct of proceedings regarding same; because, as the Post concedes, the public already knows the basic details, for example:

1. Morgan alleges her former husband, Foretich, has sexually abused their child.
2. Foretich denies the allegations.
3. Morgan is presently incarcerated for her refusal to allow her former husband, Foretich, unsupervised visitation with their minor child.

However, what the public does not know, supposedly, are the detailed allegations made in this court as compared

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[8] The sample pages included testimony of Morgan and Dennis Harrison, Ph.D. The court's observation herein of a different specific testimony is purposely written so as to avoid clarity whether this observation of different specific testimony relates to Morgan or Harrison, or both.

[9] *See Mokhiber*, slip op. at 36.

to what has been revealed in the Virginia trial, and numerous newspaper, magazine, radio and television reports about both proceedings. Not only was there the federal court trial in the Eastern District of Virginia from which the public may currently gain information, there are two published appellate decisions by the D.C. Court of Appeals, a public habeas corpus petition and decision in the U.S. District Court for the District of Columbia, the appellate record and briefs in the U.S. Court of Appeals for the Fourth Circuit, and emergency petitions to the U.S. Supreme Court.[10] The argument that continued sealing of the record of these proceedings prevents the public from understanding how the issues in this case have been addressed and resolved by the court is not compelling. At most, all that has been demonstrated is an extreme curiosity about the specific allegations of abuse. Such curiosity, no matter how extreme does not weigh heavily against the child's rights of privacy.

In April 1987 this court attempted to balance the public interest in these proceedings and Morgan's request for total unsealing of same with the opposition by Foretich, in his own behalf, and the guardian in behalf of the child. The balancing, as it were, resulted in substantial public proceedings from that time which were regularly attended by at least one Post reported and other members of the public at various times. As previously stated, the extent to which these proceedings remain sealed is opposed by the Post and Morgan. Now, however, the court is confronted with its own April 1987 order in determining whether transcripts, orders, pleadings, documents and evidence should be unsealed so as not to contravene the remaining restrictions.

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[10] There are also certain unresolved allegations that records of these proceedings have been publicly disclosed outside of any judicial or administrative proceeding.

This court concludes that unsealing of orders, pleadings, and evidence within current restrictions will not satisfy the curiosity for the detailed allegations. As has been recognized by this court, the allegations of abuse are inextricably intertwined with every phase of these proceedings. The allegations can be damaging to the child and the child's reputation, now and in the future. To allow the allegations to be published to the world and to allow this court to serve as a public forum on the issue of alleged abuse at the expense of compromising this innocent child's right to privacy and freedom from notorious public scrutiny is adverse to the best interests of the child.[11]

The April 1987 lessening of disclosure restrictions in this case has brought about a request for further lessening of restrictions. There does not appear to be an acceptable middle ground which would satisfy everyone. Moreover, redacted documents and exhibits would serve no purpose other than to highlight the existence of restricted information, and promote speculation about specific redactions. At this stage of the litigation, no purpose would be served by unsealing the documents and exhibits, even if redacted to conform with the disclosures permitted by the court's April 1987 order.

The disclosures thus far have already had damaging effects upon the child. There is still the element of public sensationalism concerning Morgan's status as an incarcerated civil contemnor. The appeal of the federal jury trial is pending. There are numerous appeals of this court's orders pending in the D.C. Court of Appeals. The child's whereabouts and present conditions are unknown. A recent denial of Morgan's federal habeas corpus petition may result in an appeal of that decision or a new petition in this court. There are numerous issues under

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[11] See Memorandum Opinion and Order dated November 26, 1986, at 4.

advisement by this court concerning custody, visitation, attorney's fees, and possible criminal contempt. Perhaps, upon the final resolution of some of these issues, the public's interest will exceed the recognized privacy interests—but not now. As the Supreme Court stated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978):

> Every Court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of the court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes digusting details of a divorce case.' In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893), Accord, e.g., C. v. C., 320, A.2d 717, 723, 727 (Del. 1974).

The argument that this court should unseal the record related to the recusal motion is not frivolous. The Post argues that the public is entitled to know why recusal was sought and why it was denied, and to determine for itself whether the judge who sent Morgan to jail should have recused himself. Since guarding against potential abuse of judicial power is itself one of the bases for the First Amendment right of access, argues the Post, there are particularly strong reasons why the recusal portion of the contempt proceeding should be public.

Subsequent to this court's findings in July 1986 which formed the basis for a contempt judgment the following month, Morgan has sought recusal on more than one occasion. Each recusal request is based on this court's rulings, in-court comments, or events concerning the child. To separate Morgan's recusal requests from the specific allegations about the child would render the re-

quests meaningless or convey misinformation. Each recusal request by Morgan bootstraps her desire to unseal the record, in which effort the Post joins arguing the public's right to know. On one hand the Post argues that the public already knows, and on the other, the Post argues that the public does not know; however, for purposes of this argument, the Post contends that the public does not know and is entitled to access to the record to judge for itself.

At present, there are other bases on which the public can judge for itself, including the published appellate reviews of this court's orders and rulings, the public ruling on Morgan's petition from habeas corpus, the Virginia federal court's jury verdict on Morgan's claims in that proceeding, and numerous articles and broadcast reports based on interviews of the parties, counsel and witnesses. Contrary to the Post's position, this court concludes that unsealing documents and exhibits at the present time would be harmful to the child if the specific allegations are not redacted; and if the specific allegations concerning the child are redacted, no appreciable increase in public understanding is likely to result.

As argument proceeded on the instant motion, it appeared that it would have been helpful to the Post and the court if the request for unsealing could have been particularized to a specific pleading, order or hearing date. The court file in this case is the most voluminous file known for a District of Columbia domestic relations proceeding. The clerk's record of docket entries would likely provide the Post and the public with an historical context for the ongoing litigation which is otherwise unavailable. Such would be helpful to the Post and the public in gaining an understanding of the numerous complex issues before the court since the inception of this case. The clerk's record of docket entries would also provide a basis for particularizing future requests, if any, that a specific document or exhibit be considered

for unsealing. Accordingly, the clerk's record of docket entries from the inception of this case through the entry of this order on said docket shall be opened for public inspection. Future docket entries shall be under seal until further order of the court.

The ruling today is not taken lightly. This court recognizes that this ruling most likely stretches to its maximum limit the permissible discretion of the court. The issues raised by the Post are not frivolous. Intense appellate scrutiny should result. Absent the ruling of this court, the detailed allegations about the child made in these proceedings would be public for whatever use a member of the public determines. The possible damaging effects upon the child are not speculative. This court does not subscribe to the academic conclusion of the Post that little additional harm to the child would result from total unsealing of the record.

Lastly, because there have been proceedings conducted in open court with members of the public and press present at various times, the court will unseal the transcripts of those proceedings, with the possible exception of bench conferences and, in this regard, has undertaken a process to identify same.

THEREFORE, it is by the court this 15th day of April, 1988

ORDERED, that the Washington Post's motion to intervene and for access as it relates to the clerk's record of docket entries for this case from inception to entry of this order shall be and the same is hereby GRANTED; future docket entries shall be sealed until further order of the court, and it is further

ORDERED, that the said motion as it relates to transcripts of proceedings conducted herein which were open to the public shall be and the same is hereby GRANTED, and it is further

ORDERED, that the said motion as it relates to documents and exhibits shall be and is hereby DENIED.

/s/ Herbert B. Dixon, Jr.
HERBERT B. DIXON, JR.
Judge
(Signed in Chambers)

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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
FAMILY DIVISION

C.A. No. D-684-83

JEAN ELIZABETH MORGAN,
Plaintiff

v.

ERIC A. FORETICH,
Defendant

ORDER

(Inviting Responses of Counsel on Pending Motions for Contempt)

By order dated July 7, 1987, this court referred various motions for contempt [1] to the United States Attorney for the District of Columbia for a determination of his interest, if any, in the prosecution of plaintiff Jean Elizabeth Morgan, plaintiff's attorney, Richard L. Ducote, Esquire, and defendant Eric A. Foretich for alleged vio-

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[1] On August 11, 1986, the defendant Eric A. Foretich, by and through his attorney, John C. Lenahan, Esquire, moved this court to cite the plaintiff and her attorney, Richard L. Ducote, Esquire, for contempt for violations of the court's order sealing these proceedings and prohibiting the parties from disclosing information under seal. On March 2, 1987, the plaintiff Jean E. Morgan, by and through her attorney, G. Allen Dale, Esquire, likewise moved this court to cite the defendant for contempt for similar violations. The court subsequently scheduled a hearing date of April 28, 1987; however, said hearing was vacated upon the court's decision to formally refer the matters to the United States Attorney for his initial consideration.

lations of the court's closure and sealing orders. The United States Attorney referred the matter to the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice. A written response was received from the Department of Justice on September 23, 1988, a copy of which is attached to this order. In essence, the Department of Justice has determined to decline prosecution and to conduct no further inquiry into the referral for lack of prosecutive merit unless further action is requested by the court.

Before further action is taken on the referenced motions, counsel for the individuals against whom the motions are directed are invited to advise the court by memorandum of their position concerning further proceedings on said motions. It would be helpful for this court to be advised if any party desires to pursue said motions, urges that said motions be dismissed or that the court exercise its inherent authority independent of the Department of Justice's decision, or proposes any other disposition of the referenced motions.

Counsel are requested to submit their memorandum in response to this order on or before November 4, 1988.

DATED this 19 day of October, 1988.

/s/ Herbert B. Dixon, Jr.
HERBERT B. DIXON, JR.
Judge
(Signed in Chambers)

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U.S. DEPARTMENT OF JUSTICE

[SEAL]

Washington, D.C. 20530

[Sep. 20, 1988]

The Honorable Herbert B. Dixon, Jr.
Superior Court of the District of Columbia
Washington, D.C. 20001-2131

Re: Morgan v. Foretich
(Superior Court Case No. D-684-83)

Dear Judge Dixon:

In August 1986, this custody case resulted in a finding of contempt against the plaintiff-mother, Dr. Elizabeth Morgan, for her refusal to comply with court-ordered visitation of the minor by the defendant-father, Foretich. Statements made to the media after that contempt hearing by both parties and the plaintiff's attorney were viewed as contumacious by the opposing sides. You requested a review of the merits of prosecuting these cross-complaints from the United States Attorney for the District of Columbia. The matter was received by the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice in March of this year.

Subsequently, we requested pertinent transcripts and orders from your Court. The record as provided has been reviewed to determine whether criminal contempt charges should be commenced against any of the individuals involved for violation of the court order sealing the case.

This Section has decided to decline prosecution, having determined, as more fully set forth below, that there exists reasonable doubt that criminal contempt has been committed. In responding to your referral, however, we

are cognizant of this Court's inherent right to vindicate any violation of its orders independent of the Department of Justice's opinion. See *Young* v. *United States ex rel. Vuitton et Fils*, 107 S.Ct. 2124, 2131, 2133 (1987).

I. *Summary of Facts*

Subsequent to the dissolution of the marriage of Dr. Jean Elizabeth Morgan and Dr. Eric A. Foretich, a heated custody battle has continued. Dr. Morgan, in her fight to prevent visitation, alleged the minor child was the victim of sexual misconduct. Prior to August 5, 1986, this court ordered that Dr. Morgan allow visitation of the child by Dr. Foretich. When she refused, a contempt hearing was scheduled.

D.C. Code § 11-1101(4) gives exclusive jurisdiction to the Family Division of the Superior Court over "actions seeking custody of minor children . . ." as well as other matters that were before the court at the time of the alleged contempt. On several occasions since the beginning of the proceedings in this case, written orders closing the proceedings and the record were issued pursuant to D.C. Code § 16-2344, which provides in pertinent part:

> Upon trial of proceedings over which the Family Division of the Superior Court has jurisdiction under paragraph (3), (4), (10) or (11) of Section 11-1101, the Court may exclude the general public and, at the request of either party, shall exclude the general public.

On November 8, 1984, Dr. Foretich's Motion for Protective Order, Exclusion of the Press and Public from the Trial and Order Proceedings and the Motion to Seal the Entire Record were granted. Subsequent orders by the court continued to close the proceedings and the record without objection or question until the August 5, 1986 hearing.

On August 5, 1986, at the hearing on contempt, Judge Dixon ordered the court cleared and reminded counsel and the parties that the proceedings were being conducted under seal of the court and counsel and parties were under order not to discuss these proceedings on the outside. (Tr. 43)

Mr. Witt, one of Dr. Morgan's attorneys, stated that he was unaware of any order that counsel and parties not communicate with others with respect to these proceedings. The only order in effect, he argued, was the statutorily allowed sealing of the court record. (Tr. 44)

He also argued the contempt hearing needed to be an open hearing to meet constitutional requirements of due process under the Fifth Amendment.

In response to Attorney Witt's statement that no order existed preventing the parties or their counsel from communicating with others with respect to these proceedings, the court replied:

> THE COURT: I will let you exercise your discretion to the extent you feel the Court order allows, Mr. Witt. I know what orders have been signed and so do you.

The following discussion on the record then transpired:

> MR. WITT: I want the Court to be clear I'm not requesting permission of the Court to talk to anybody. I thought the record should be clear in terms of what the court orders have been. I take seriously what the Court says, as well as what the Court writes. The Court just made a statement. I know today *I received from Mr. Lenahan at four o'clock a motion which asked the Court to direct the people not to talk to other people.* I had not seen that motion before four o'clock. I have not been aware of any such request. I have not had an opportunity

to answer it. *I don't think the Court should be acting on granting such a motion.*

THE COURT: *I'm not.*

MR. WITT: I take it then—I take it then that the Court's statement was intended to add nothing to what the written orders of this Court already provides.

THE COURT: That's correct.

Do you believe, Mr. Witt, since we are in this discussion, that the previous orders of the Court allow interviews with radio and television stations and newspapers about the proceedings that have been conducted?

MR. WITT: I do believe, Your Honor—I am not aware of any order of this Court which prohibits that.

MR. DUCOTE [Dr. Morgan's other attorney]: For example, Your Honor—

THE COURT: —That matter is not before the Court. At the moment I just thought that I would mention it because the matters were closed in the best interest of Hillary [sic] and—and an order that was consented to by all parties. Now, to have details about Hillary [sic] splattered in newspapers, on television and radio, another question might come up before me, and I bring it up as a topic of interest at this time.

MR. DUCOTE: So it is the Court's position the fact that Dr. Morgan has been jailed in response to the Court's order is something that is a matter which the Court is directing to be held confidential?

THE COURT: The written orders as they exist stand. *Now, if I start reading about Hillary [sic] in the newspapers or hearing about her on television or radio, there is no doubt in my mind that that contravenes what those Court orders were intended to accomplish.*

MR. LENAHAN [Dr. Foretich's attorney]: That is—That is the position of the defendant, Your Honor.

If I may just briefly respond to that particular point?

THE COURT: There is really nothing before me. I thought I would just let counsel know.—(Tr. 44-46) (emphasis added)

Dr. Foretich's attorney then related evidence of leaks to the press and requested that the court state for the record its views as to the matter of sealing the record and exclusion of the press. Dr. Morgan's attorney responded as follows:

MR. WITT: I think Mr. Lenahan is a hundred percent wrong in what he suggest [sic] about what this Court's order has done in the past or what they could be in the future. At this time, unfortunately, this matter is before the Court of Appeals,[1] not this Court, and I suggest that anything further would be inappropriate and beyond the jurisdiction of this Court.

THE COURT: Let me put it this way, I don't intend to give any rulings right now. I have already had to make several difficult rulings in this case, and if more difficult rulings come up in the future, I will make them, and the parties will just have to live with those rulings. I will not shy away from it just because it is difficult. I will call it as I see it and parties will just have to live with it. (Tr. 50)

Following this hearing plaintiff's counsel, Ducote, made statements to the press and provided documents that were being filed in the appeal. Plaintiff Morgan also made statements regarding the case to the media. On August 12, 1986 the defendant Foretich allegedly also made statements to the press.

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[1] Dr. Elizabeth Morgan, before this point in the hearing, had filed a Notice of Appeal of the contempt finding with the court.

On August 15, 1986, Dr. Foretich moved this Court for a finding of contempt against plaintiff, his former wife Dr. Morgan, and her attorney, Richard Ducote. He alleged that on August 5th and 6th the plaintiff and her attorney granted interviews with the press and that on August 7th copies of plaintiff's motion to stay the contempt order were distributed to the press.

Disclosures by Dr. Morgan and her attorney Ducote included interviews with the press about the contempt charge against Dr. Morgan and her incarceration. In addition, the motion to stay the contempt order that was filed in the Court of Appeals was distributed to the press by Ducote. Attachments to this motion included portions of the record that had been the subject of the order to seal. Ducote claimed that until the appellate court sealed the record, his disclosure could not be in violation of any order since any member of the press could have seen what had been filed in the clerk's office of the Court of Appeals. (Richard Lynn Ducote Deposition November 25, 1986).

On March 2, 1987 Dr. Morgan and different counsel moved for a finding of contempt against Dr. Foretich for statements he made to the Washington Post on August 12, 1986.

The scheduled contempt hearing on these cross motions was vacated by the court and a formal referral to the United States Attorney was issued. After the recusal of the United States Attorney's office the matter was referred to the Department of Justice and, ultimately, to the General Litigation and Legal Advice Section in March of 1988.

II. *The Law*

The most applicable contempt provision made applicable by D.C. Code § 11-944 is codified at 18 U.S.C. § 401(3). That provision provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
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> ———
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The prohibition of section 401(3) is quite clear: a party violates the provision if he disobeys an order of the court. *See Green v. United States*, 356 U.S. 165, 170 (1958); *NLRB v. Deena Artware*, 261 F.2d 503, 508 (6th Cir. 1958), *rev'd on other grounds*, 361 U.S. 398 (1960). To establish a violation of section 401(3), the following three elements must be shown: (1) a clear and definite court order; (2) knowledge of the order by the defendant; and (3) actions taken by the defendant with a willful, contumacious, or reckless state of mind. *In Re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973). An order that restrains conduct must give the affected parties "fair warning" of what is prohibited. *United States v. Christie Industries, Inc.* 465 F.2d 1002, 1006 (3d Cir. 1972). Whether this fair warning is provided is based on more than the language of the order and includes: the circumstances surrounding the entry of the order; the relief that the moving party sought; the evidence that the parties produced at the hearing; the harm that the order seeks to prevent; and the manner in which the order seeks to protect these interests. *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir. 1974); *United States v. Christie Industries, Inc.*, 465 F.2d at 1007.

In evaluating whether an order gives clear notice of what was prohibited, courts will also consider the position, experience and knowledge of the parties. These principles apply with equal or even greater force when th accused contemnor is an attorney. For example, in *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193 (9th Cir. 1974), the attorney refused to comply with an order because she thought it was confusing and unconstitu-

tional. The court rejected this argument because the evidence indicated that any confusion that the attorney experienced was "self-induced" and "self-perpetuated." *Id.* at 195.

To be convicted of criminal contempt under section 401(3), the order must be entered upon the records of the court and the defendant must have knowledge and notice of the order. *United States v. Rylander*, 714 F.2d 996, 1003 (9th Cir. 1983) *cert. denied*, 467 U.S. 1209 (1984); *United States v. Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982). It is not necessary that the party be served with a copy of the order. Indeed, formal notice or personal service is immaterial to whether the party has actual knowledge of the order. *United States v. Rylander. Ibid.*

If the evidence shows that the defendant's actions were taken in good faith and were based on a plausible but mistaken interpretation of the order, he lacks the requisite willfulness to support a contempt conviction. *United States v. Greyhound Corp.*, 508 F.2d at 532; *In Re Brown*, 454 F.2d 999 at 1007 (D.C. Cir. 1971). Similarly, a defendant does not have the requisite intent if the evidence establishes that he did not understand the order or if it was not apparent that the order applied to him. *See In Re Joyce*, 506 F.2d at 373, (5th Cir. 1975) 377.

However, a defendant cannot defeat a finding of intent by advancing an implausible interpretation of an order. Although a defendant is not required to seek clarification from the court of an allegedly ambiguous order, "a failure to do so when combined with actions based upon a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the decree." *United States v. Greyhound Corp.*, 508 F.2d at 532.

A party has committed a criminal contempt when he knows that the conduct is wrongful but he intentionally commits the act despite this knowledge. *In Re Brown*,

454 F.2d at 1007. " 'The minimum requisite intent [for criminal contempt] is . . . defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.' " *United States v. Greyhound Corp.*, 508 F.2d at 531-32. The "willfulness" required under the provision has been defined as " ' a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.' " *Vaughn v. City of Flint*, 752 F.2d 1160, 1169 (6th Cir. 1985).

Willfulness may be inferred from the facts and circumstances of the proof. *United States v. Greyhound Corp.*, 508 F.2d at 532, 540. Actions taken prior to the entry of the order although not subject to the contempt power, may be probative of intent and willfulness. *See NLRB v. Deena Artware*, 261 F.2d at 509.

The contemnor may attempt to also defend a charge by arguing that he did not obey the order because he thought that it was invalid or contrary to law, but the cases are clear that it is no defense to criminal contempt for a party, especially a lawyer, to argue that he took his actions because he believed that the order was invalid or contrary to law. *Walker v. City of Birmingham*, 388 U.S. 307, 313-21 (1967). Nevertheless, a jury may find this argument appealing.

A party is liable for all actions taken in contravention of an " 'outstanding and unreversed' " order. *Smotherman v. United States*, 186 F.2d 676, 678 (10th Cir. 1950). As the Tenth Circuit explained when addressing the defendant's violation of a restraining order:

> Appellants had no right to determine for themselves whether the court had jurisdiction to restrain their acts. That was a matter for the court to decide . . . . Until [the restraining order] was set aside by orderly judicial process they were bound at their peril to heed its mandate.

If a party believes that the order is invalid, his remedy is not to disobey the order but to litigate the issue by appeal. *Walker v. City of Birmingham*, 388 U.S. at 317; *United States v. Stine*, 646 F.2d 839, 845 (3d Cir. 1981); *United States v. Christie Industries, Inc.*, 465 F.2d at 1012. However, even if the contemnor is correct on appeal that the order was contrary to law, such a finding will not negate the criminal contempt. *Pabst Brewing Co. v. Brewery Workers Local Union No. 77*, 555 F.2d 146, 150 (7th Cir. 1977). The justification for this result "stems from the system's need for compliance with its mandates." *United States v. Stine*, 646 F.2d at 846.

III. *Discussion*

There is insufficient evidence to prove beyond a reasonable doubt that the subjects willfully violated an order when they made disclosures to the media. The record reflects that all the parties were aware of the order sealing the file and excluding the public from the proceedings. In fact, both sides had agreed to that order. However, the order was, we believe, ambiguous as to prohibited types of disclosures, and applicability to the contempt proceeding, thereby reducing the prosecutive merit of the allegations of contempt.

It is not clear from the transcripts of hearings both before and after the alleged disclosures whether the order restricted discussions of the contempt case with the public. The scope of the restrictions were not defined for Dr. Morgan and her attorney at the August hearing despite counsel's statements that he did not understand the sealing orders as applicable. Similarly, the ambiguity of the order can be seen a few months later at the hearing on a *Washington Post* motion to be present at future court proceedings.

At that hearing the *Post's* right to remain during the hearings was denied. This Court discussed the November 8, 1984 order that initially sealed the court file:

> The fact that disclosures may have occurred in other forms in other matters in and of themselves would not be a sufficient basis to break the seal and to open these proceedings to the public. *In fact, those disclosures, if they occurred in certain ways, may or may not be violations of the Court order.* (emphasis added)

(October 29, 1986 Tr. 10)

When asked by the *Post* whether the order prohibited the parties and their lawyers to the proceedings from discussing the case with a reporter or members of the public the court refused to provide any interpretation of that order noting that the matter may be under litigation at that time. (October 29, 1986 Tr. 14)

Finally, the court in response to Dr. Morgan's attorney Dale's request for clarification of the scope of the order stated:

> THE COURT: Well, Mr. Dale, we will deal with the issue but not right now. If you wanted a response on that, you could have given me some time in which to give your response. We have a motion for contempt pending which will also address some of those issues and if there was any confusion about what could be done or what could not be done, that was one time to also get it straightened out.
>
> MR. DUCOTE [Dr. Morgan's other attorney]: I asked at that time, Your Honor—
>
> THE COURT: You're not going to cite what I say right now as precedent for what may or may not have happened at some time in the past. If anyone wanted guidance, we would have accomplished that.

(October 29, 1986 Tr. 17)

As the transcripts disclose, the order sealing the record and excluding the public from the courtroom was not

sufficiently clear to make a successful contempt prosecution possible against Dr. Morgan and her attorney, Mr. Ducote, for statements they made to the press. In addition, Dr. Morgan can argue she was acting in good faith reliance on Ducote's advice when she made public disclosures. Ducote admitted in a deposition that he had advised Dr. Morgan that she had a First Amendment right to speak about the case.

Ducote did distinguish these disclosures from the dissemination of the files. The Morgan Application to Stay with the attachments consisting of sealed records was distributed to the press only after the application was filed with the court of appeals and before the appellate record was sealed, approximately one-half hour to fifty-five minutes later. Ducote stated in the deposition that the distribution coincided with the time that any member of the press could have seen this pleading in the Clerk's office of the Court of Appeals.

Dr. Foretich stands accused by Dr. Morgan of giving interviews with the press, which were in response to the publicity generated by Dr. Morgan and Attorney Ducote's earlier disclosures to the media. Dr. Foretich made these statements to the press before he accused Dr. Morgan and Attorney Ducote of contempt.

Dr. Foretich cannot rely on a good faith defense as his attorney appears in the August 5 record to interpret the order as prohibiting public disclosure. Nevertheless, Dr. Foretich's remarks denying the accusations of sexual misconduct are more excusable since they were made in self defense.

The actions of the parties here are probative in evaluating whether they were engaged in a willful disregard of this court's order. For example, on August 5, 1986, a clarification of the order was sought by Dr. Morgan and her attorneys. The order excluding the press from the courtroom was appealed immediately. When an order

was issued by this court in November 1986 specifically restricting the scope of discussions by the parties and counsel with the general public, this court noted that substantial compliance was obtained. (Findings of Fact, February 12, 1987).

Finally, since the disclosures in August of 1986, there has been substantial disclosure of the same information in a separate civil law suit between the two parents that was tried in the Eastern District of Virginia. The additional publicity that would be generated by a prosecution of the parties at this time would only exacerbate the unfortunate situation of the child whom the sealing order was designed to protect.

For the foregoing reasons, the Criminal Division has determined to decline prosecution and to conduct no further inquiry into this referral for lack of prosecutive merit unless further action is requested by this court.

Sincerely,

EDWARD S.G. DENNIS, JR.
Acting Asistant Attorney General
Criminal Division

By: /s/ Lawrence Lippe
LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 87-2549, 87-2550, 87-2558 and 87-2559

ELIZABETH MORGAN, M.D.,
Plaintiff-Appellant,

v.

ERIC A. FORETICH; VINCENT FORETICH; DORIS FORETICH,
Defendants-Appellees.

HILARY FORETICH, an Infant who sues through her mother and next friend, ELIZABETH MORGAN, M.D.,
Plaintiff-Appellant,

v.

ERIC A. FORETICH; VINCENT FORETICH; DORIS FORETICH,
Defendants-Appellees.

ELIZABETH MORGAN, M.D.,
Plaintiff-Appellee,

v.

ERIC A. FORETICH; VINCENT FORETICH; DORIS FORETICH,
Defendants-Appellants.

HILARY FORETICH, an Infant who sues through her mother and next friend, ELIZABETH MORGAN, M.D.,
Plaintiff-Appellee,

v.

ERIC A. FORETICH; VINCENT FORETICH; DORIS FORETICH,
Defendants-Appellants.

Argued Jan. 6, 1988

Decided May 17, 1988

Rehearing and Rehearing In Banc
Denied July 21, 1988

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and RUSSELL and ERVIN, Circuit Judges.

DONALD RUSSELL, Circuit Judge.

The plaintiffs, Dr. Elizabeth Morgan and her minor daughter Hilary Foretich, brought this action against the defendants, Dr. Eric Foretich and his parents, for damages arising out of the defendants' alleged sexual abuse of Hilary. Dr. Foretich counter-claimed for defamation and other damages caused by this lawsuit. The jury found for Dr. Foretich on Dr. Morgan's claims and for Dr. Morgan on Dr. Foretich's counter-claims. Plaintiffs appealed, defendants cross-appealed, and the appeals were consolidated for oral argument. Jurisdiction is based on diversity of citizenship.

The determinative issue in this appeal is whether the district court erred in excluding evidence that Hilary's sister had been sexually abused and in excluding all out-of-court statements made by the plaintiff, Hilary Foretich. We conclude that the district court abused its discretion by excluding this evidence and we reverse and remand that portion of its judgment. However, the district court committed no error with regard to defendants' counter-claims and we affirm that part of its judgment.

I.

Hilary Foretich was born in August 1982, the daughter of Dr. Eric Foretich and his third wife from whom he is now divorced, Dr. Elizabeth Morgan. Heather Foretich is three years older than Hilary and is the minor daughter of Dr. Foretich and his second wife. Dr. Foretich was awarded visitation rights with both children and the girls have frequently visited the Foretich home simultaneously.

In the summer of 1983, Dr. Morgan received a call from Heather's mother who expressed concern that the girls were possibly being abused during visitation periods with Dr. Foretich and his parents. Dr. Morgan became further alarmed when signs of physical abuse became apparent on Hilary and later when Hilary displayed an age-inappropriate understanding of sexual matters and began to make sexually explicit statements. After consulting specialists in the field of child sexual abuse, Dr. Morgan became convinced that Hilary was being abused during the visitation periods with Dr. Foretich and his parents. This action followed.

At trial, plaintiffs attempted to introduce out-of-court evidence showing that Hilary's sister, Heather, displayed similar signs of sexual abuse. Plaintiffs also sought to introduce statements made by Hilary to her mother and to a child psychologist. The district court excluded all evidence of this nature.

Plaintiffs contend that the district court committed reversible error in its evidentiary rulings. First, plaintiffs assert that evidence of Heather's abuse should have been admitted to show the identity of the perpetrator and to rebut claims that Hilary's injuries were accidental or self-inflicted. Second, plaintiffs argue that statements made by Hilary to her mother after Hilary returned from visitation with Dr. Foretich were admissible as excited utterances. Finally, plaintiffs contend that statements made by Hilary to her psychologist were admissible as statements made for purposes of medical diagnosis or treatment.

Defendants respond by arguing evidence of sexual abuse suffered by Heather Foretich was properly excluded because of its potential for prejudicing the jury. Defendants further assert that all out-of-court statements made by Hilary Foretich were properly excluded because of hearsay considerations and because Hilary's age made her incompetent to testify as a witness.

II.

General

Reported cases of child abuse in this country have increased dramatically in recent years. An estimated one in five females suffers from sexual abuse as a child.[1] Figures from 1976 to 1983 reflect an 852% increase in the number of child sexual abuse cases reported.[2] However, in two-thirds of child abuse cases, the incident is never even reported.[3] Even when the incident is reported, prosecution is difficult and convictions are few.

Much of this difficulty stems from the fact that methods of proof in child abuse cases are severely lacking. Often, the child is the only witness. Yet age may make the child incompetent to testify in court, and fear, especially when the perpetrator is a family member, may make the child unwilling or unable to testify.

Courts and legislatures alike have struggled with this deeply troubling problem. The courts have often been criticized for expanding existing hearsay exceptions beyond recognition [4] while several state legislatures have

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[1] D. Finkelhor, *Sexually Victimized Children* 53 (1979), *cited in* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv.L.Rev. 806 (1985).

[2] Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 Cath.U.L. Rev. 1021, n. 1 (1985).

[3] Note, *supra*, note 1, at 806, n. 7.

[4] *See, e.g.*, Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. Marshall L.Rv. 1 (1984); Comment, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J.Juv.L. 59 (1984); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum.L.Rev. 1745 (1983).

undertaken to create altogether new hearsay exceptions for the victims of child abuse.[5]

In the form of a civil suit, the instant case squarely presents this Court with many of these difficult issues. In rendering this judgment, we are mindful of the common-sense admonition that "[w]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without." Fed.R.Evid. art. VIII advisory committee's note.

III.

Evidence of Abuse Suffered by Hilary's Sister, Heather Foretich

At trial, plaintiffs sought to introduce testimony by Dr. Charles Shubin, a pediatrician who was qualified as an expert in the field of child sexual abuse. Dr. Shubin had examined both Hilary and Heather Foretich and was prepared to testify that both girls had suffered sexual injuries and that the mechanism of injury was essentially the same in both cases. Plaintiffs also had numerous other professionals and lay witnesses who were prepared to testify that Heather had been sexually abused during visitation periods with the defendants.

The district court excluded all evidence of sexual abuse suffered by Heather Foretich concluding that such evidence was prejudicial and could not be allowed without a full scale trial on the allegations made by Heather. We disagree.

As a preliminary matter, the district court erred in concluding that a full scale trial would be required into allegations made by Heather Foretich. This Court has held that in applying Rule 404(b) of the Federal Rules of Evidence, evidence of other crimes need not be estab-

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[5] *E.g.*, Wash.Rev.Code Ann. § 9A.44.120 (Supp. 1982); Kan.Stat. Ann. § 60-460(dd) (Supp. 1982).

lished by the "clear and convincing evidence" standard which some other courts have seen fit to apply.[6] Instead, "we have not imposed any 'clear and convincing evidence' standard in our application of Rule 404(b)" and "we decline to adopt such a requirement." *United States v. Martin*, 773 F.2d 579, 582 (4th Cir.1985). Rather, evidence of other crimes or acts will be admissible even absent clear and convincing proof of those other crimes or acts if the proffered evidence can meet the threshold requirements of Rule 404(b).

Rule 404(b) of the Federal Rules of Evidence provides that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has held Rule 404(b) to be an "inclusionary rule" which " 'admits all evidence of other crimes [or acts] relevant to an issue in a trial except that which tends to prove *only* criminal disposition.' " *United States v. Masters*, 622 F.2d 83, 85 (4th Cir.1980) (emphasis added) (quoting J. Weinstein & M. Berger, *Weinstein's Evidence* § 404[08] at 404-41 and 404-42 (1979)).

The threshold requirements for admitting evidence under Rule 404(b) were recently stated by this Court in *United States v. Lewis*, 780 F.2d 1140 (4th Cir.1986). In *Lewis*, we stated the determinative questions to be (a) whether the proffered evidence is relevant to an issue other than the defendant's character, and (b) whether

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[6] *See United States v. Wormick*, 709 F.2d 454 (7th Cir. 1983); *United States v. Leisure*, 807 F.2d 143 (8th Cir. 1986). *But see, United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

the probative value is *substantially* outweighed by its prejudicial effect. *Id.* at 1142.

The proffered evidence of sexual abuse suffered by Heather is admissible under the standard set forth in *Lewis*. First, the evidence was not offered to show the depravity of the defendants' character. Rather, this evidence was highly relevant to disputed issues in this case. Fundamentally, this evidence was essential in that it tended to identify the defendants as the perpetrators of the crime against Hilary since only the defendants had access to both girls. No other piece of evidence could have had a comparable probative impact as to the identity of Hilary's assailants. This evidence also negated several defenses raised by the defendants: Hilary's injuries were caused by Dr. Morgan; were fabricated by Dr. Morgan; or were caused by self-infliction. It has been suggested by some that, in child abuse cases, the inquiry should end here: "When prior acts were admitted to prove disputed issues in the case, such as the identity of the defendant, the absence of mistake or accident, or the defendant's intent, no violation of the other crimes evidence rule exists." Comment, *Other Crimes Evidence to Prove the 'Corpus Delicti' of a Child Sexual Offense*, 40 U. Miami L.Rev. 217, 220 (1985).

However, after determining that other acts are relevant to an issue besides character, the question then becomes whether the probative value of the evidence is *substantially* outweighed by its prejudicial effect. This question has previously been addressed by this Court in the analogous case of *United States v. Woods*, 484 F.2d 127 (4th Cir.1973), *cert. denied*, 415 U.S. 979, 94 S.Ct. 1566, 39 L.Ed.2d 875 (1974). In *Woods*, a case allowing criminal prosecution for the suffocation death of a young child, we allowed the government to introduce evidence of abuse suffered by other children whom the defendant had access to even though the defendant was not accused of abusing the other children. We noted "when the crime is

one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime." *Id.* at 133. We further found "the evidence [of other crimes or acts] is so persuasive and so necessary in case of infanticide or other child abuse by suffocation if the wrongdoer is to be apprehended, that we think its relevance clearly outweighs its prejudicial effect on the jury." *Id.* at 135. We find the need for other act evidence to be equally compelling in the context of child sexual abuse. By the very nature of the crime, there are seldom any eyewitnesses. Therefore, as in this case, the defendant's word is pitted against that of a young child and the older defendant will almost certainly have an edge in credibility.

In this case, the jury was left to choose between believing the story of a young girl as related by several witnesses or believing the testimony of her father, the doctor, who offered several plausible explanations for the child's injuries. However, had the jury been allowed to hear of the other sister's very similar injuries, the doctor's explanations would no longer have been so plausible. Given the similarity of the injuries and the fact that only the defendants had access to both girls, the identity of the perpetrators becomes clearer. And given this evidence, the defenses of self-infliction, fabrication, or abuse by Dr. Morgan become quite implausible.

We have stated previously that the possibly prejudicial effect of evidence can " 'require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.' " *Masters* at 87 (quoting Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 Vand.L.Rev. 385, 410 (1951-52)). This is not that case. While we are cognizant of the potential for prejudice in this case, we

are also mindful of the fact that the trial judge could have issued a limiting instruction. *Id.* To simply exclude this evidence which went not to the character of the accused but rather to essential issues on trial and which was highly probative of the defendants' guilt was an abuse of discretion.

IV.

Hilary's Statements to Her Mother

Immediately after returning home from visitation periods with her father, Hilary would often appear extremely excited and agitated and would begin to describe to her mother sexual activities that had occurred during the visits. On the advice of her attorney, Dr. Morgan began to keep a diary recording Hilary's statements.

The district court originally ruled that Dr. Morgan could not testify to what Hilary had told her. The court reasoned that if the diary itself were to be admitted into evidence then any such testimony by Dr. Morgan would merely be cumulative. However, at the conclusion of trial, the court refused to admit the diary or excerpts into evidence finding that they were self-serving and full of irrelevancies. Without ever reaching the merits of whether Dr. Morgan's testimony or diary would fit within one of the exceptions to the hearsay rule, the district court effectively excluded all reports of what had transpired during visitation.

Plaintiffs contend that five statements made by Hilary to Dr. Morgan should be admitted under the excited utterance exception to the hearsay rules. Fed.R.Evid. 803 (2). There follows a synopsis of the five statements offered by the plaintiffs:

March 25, 1985

Hilary was returned home by Dr. Foretich to Dr. Morgan's housekeeper at 3:35 p.m. Dr. Morgan ar-

rived at 5:35 to find Hilary running around the house yelling and shrieking excitedly. At 5:00, Hilary was calmed down enough to talk and began to describe how she had been sexually abused by the defendants.

May 20, 1985

Hilary was returned at 3:30, Dr. Morgan returned home at 4:45. By 6:00, Hilary began to describe sexual assaults that had been perpetrated on her by the defendants.

October 21, 1985

Hilary was returned by her grandfather at 4:00 and was again in a highly excited state. By 7:00, she had settled down enough to report that she had been sexually assaulted by the defendants.

January 20, 1986

Hilary was returned by her father at 7:00 p.m. and began to tell her mother of sexual abuse that had occurred the night before by her father.

July 20, 1986

Hilary was watching television with Dr. Morgan and viewed a scene which prompted her to describe sexual acts that had been performed on her by the defendants.

Defendants argue that these out-of-court statements made by Hilary to her mother were properly excluded because Hilary's age would have made her incompetent to testify as a witness and because the statements do not meet the requirements of the excited utterance exception to the hearsay rule.

Rule 803 of the Federal Rules of Evidence provides in pertinent part

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The basis for this rule, which creates a hearsay exception even when the declarant is available as a witness is the assumption that an excited declarant will not have had time to reflect on events and to fabricate. J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(2)[01] (1984).

Defendant's first and strongest objection to the admission of Hilary's out-of-court statements under the excited utterance exception is that Hilary would have been incompetent to testify at trial and should not, therefore, be allowed to testify out of court.[7] This argument is without merit.

We agree with the majority of courts that have studied this issue and have reached the conclusion that "although a child is incompetent to testify, testimony as to his spontaneous declarations or *res gestae* statements is nevertheless admissible." Annotation, *Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial*, 15 A.L.R. 45th 1043 (1982).[8] This issue has seldom been raised before the

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[7] Rule 601 of the Federal Rules of Evidence states that "[e]very person is competent to be a witness except as otherwise provided in these rules." However, since Hilary was never called as a witness, we are not directly faced with the issue of whether she would have been competent to testify at trial. Rather, we find that her statements are admissible regardless of her competency to testify in court.

[8] *See also* Comment, *supra*, note 4 at 65 ("[T]he preponderance of authority is to the effect that admissibility of excited utterances is not affected by the declarant's incompetence due to infancy or

federal courts of appeals. However, those that have examined the issue are in agreement with our holding today.[9]

Likewise, the leading commentators have concluded that "an excited utterance is admissible despite the fact that the declarant was a child and would have been incompetent as a witness for that reason." McCormick, *McCormick on Evidence* § 297 at 858 (3d Edition 1984). *See also* 6 *Wigmore on Evidence* § 1751 (Chadbourn Rev. 1976). Therefore, should Hilary's out-of-court statements to her mother otherwise qualify as excited utterances, her youthful incompetency will not bar the admission of this testimony.

To qualify as an excited utterance, the declarant must (1) have experienced a startling event or condition and (2) reacted while under the stress or excitement of that event and not from reflection and fabrication. J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(2)[01] at 803-87-91.[10]

There appears to be little doubt but that Hilary has been subjected to a startling condition. Testimony of the doctors and other witnesses was sufficient to justify a finding that Hilary has been sexually abused. The ques-

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other legal unavailability because the nature of the utterance is such that it obviates the usual suorces of untrustworthiness in children's testimony.").

[9] *See United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979) (Three year old "could not have been subjected to cross-examination even if he had been called as a witness by reason of his tender years," yet his statements were admissible under the spontaneous declaration exception.); *Jones v. United States*, 231 F.2d 244 (D.C. Cir. 1956) (Five year old was incompetent to testify as a witness but statements to her mother were admissible as spontaneous declarations.)

[10] *See also* J. Bulkley, *Child Sexual Abuse and the Law*, 155 (1982).

tion, then, is whether Hilary reacted while under the stress of this condition.

To answer this question, several factors must be considered, including: (1) The lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

In *Iron Shell*, the Eighth Circuit held in a child sexual abuse case that "[t]he lapse of time between the startling event and the out-of-court statement although relevant is not dispositive in the application of rule 803(2)." *Id.* at 85. Indeed, much criticism has been directed at courts which place undue emphasis on the spontaneity requirement in child sexual abuse cases.[11] It has been argued that children do not necessarily understand sexual contact by adults to be shocking, especially when the adult is a parental figure from whom the child desires love and affection.[12] Even if the child is aware of the nature of the abuse, significant delays in reporting this abuse may occur because of confusion, guilt, and fear on the part of the child.[13]

One attempt to deal with this problem has been a recognition that the time lapse to be considered in these cases is not simply the time between the abuse and the declaration. Rather, courts must also be cognizant of the child's first real opportunity to report the incident.[14]

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[11] Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum.L.Rev. 1745, 1756 (1983).

[12] *Id.*

[13] *Id.* at 1757.

[14] *See Nick, supra*, Note 7, at 1201 (assault occurred sometime during the day. The defendant and the child were asleep when

Plaintiff's declaration of July 20, 1986 has been proffered with absolutely no reference to the time of abuse or the child's first opportunity to speak of the abuse and therefore cannot qualify as an excited utterance. However, the first four statements proffered by the plaintiffs were made within three hours of the child's first opportunity to speak with her mother.

In determining whether a statement qualifies as an excited utterance, courts have varied greatly as to just how much of a time lapse is too much.[15] Given all of the other factors of trustworthiness present in this case, we find that three hours is well within the bounds of reasonableness and Hilary's statements were spontaneous declarations.

In addition to the time lapse consideration, numerous other factors of trustworthiness cited as important by the Court in *Iron Shell* are present in this case. All of the statements offered by plaintiffs were made before Hilary was four years old, and it is virtually inconceivable that a child of this age would have either the extensive knowledge of sexual activities or the desire to lie about sexual abuse that would be required to fabricate a

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mother arrived to pick the child up and the child reported the assault only after getting home and being questioned by his mother); *Kilgore v. State*, 177 Ga.App. 656, 340 S.E.2d 640, 643 (1986) (assault occurred sometime between 3:30 p.m. and 12:15 a.m. The child reported the assault only after being taken home and awakened. The court noted that the report was made at "the first real opportunity.").

[15] *See Carter v. States*, 44 Tex.Crim. 312, 70 S.W. 971 (1902) (Statement mode by child within five minutes of the assault found to lack spontaneity); *People v. Gage*, 62 Mich. 271, 28 N.W. 835 (1886) (Child's statement to her mother three months after the assault was admissible); Annotation, *Time Element As Affecting Admissibility of Statement or Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance*, 89 ALR3d 102 (1979).

story such as the one told by Hilary.[16] Hilary's tender years greatly reduce the likelihood that reflection and fabrication were involved. An examination of Hilary's physical and mental state shows that she was nearly hysterical in the moments immediately preceeding most of these statements. There can be little doubt but that she was acting under the stress of the sitution. Hilary's method of giving these statements consisted of touching herself sexually and speaking in a vocabulary that definitely belonged to a child which adds a "ring of verity to her declarations." *Nick*, 604 F.2d at 1204. Finally, Hilary's story is corroborated by substantial physical evidence and doctors' testimony. All of these factors lead to the conclusion that Hilary's out-of-court statements to her mother are trustworthy and should have been admitted into evidence.

On the whole, this case bears remarkable similarity to *United States v. Nick*, 604 F.2d at 1204 in which the Ninth Circuit admitted statements made by a sexually abused boy to his mother as excited utterances because of the following "significant guarantees of trustworthiness":

> The statement was made while the child was still suffering pain and distress from the assault. The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years. The child's statement was corroborated by physical evidence . . . it is extremely unlikely that the statement under these circumstances was fabricated. The statement was unquestionably material, and it was more probative as to the identity of the assailant than any other evidence, except [defendant's] confession. The declaration to his mother [after arriving home and being questioned] was more, rather than less probative than testimony that he might

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[16] *See* Note, *supra*, note 11 at 1751.

> have been able to give months after the event even if the district court would have found him competent. (Fed.R.Evid., Rule 601) The interests of justice were served by admitting the declaration of this child, who was the victim of a sexual assault, and far too young to appreciate the implications of that assault.
>
> Finally, that portion of the statement identifying [defendant] as the assailant is inherently trustworthy under all of the circumstances of this case. Extrinsic evidence established that [defendant] had the opportunity to commit the crime. The child knew [defendant] well, and he was not likely to mistake his assailant. The mother was not likely to have had any faulty recollection of the child's simply, shocking . . . statement. Moreover, she herself was subject to rigorous cross-examination on that score.

The above could well have been written for the case at hand. We agree with the judgment of the Ninth Circuit and conclude that based on the facts of this case, the district court abused its discretion in not admitting Hilary's four statements to her mother under the excited utterance exception to the hearsay rule.

V.

Hilary's Statements to Her Psychologist

Plaintiffs introduced the testimony of Dr. Dennis Harrison who had been qualified as an expert in psychology and child abuse and who had spent over one hundred hours examining and working with Hilary Foretich. The district court permitted Dr. Harrison to give his opinion as to Hilary's abuse but excluded all out-of-court statements which Hilary had made to him.

Plaintiffs contend that Dr. Harrison should have been allowed to repeat statements made by Hilary as state-

ments for purposes of medical diagnosis or treatment. Fed.R.Evid. 803(4).

Defendants respond that this testimony was properly excluded because of Hilary's incompetence to testify as a witness and because Dr. Harrison was sought more for the purpose of his testimony than his treatment. Defendant's arguments are without merit.

The hearsay exception for statements made for purposes of medical diagnosis or treatment is based on the rationale that "the declarant's motive guarantees [the statements'] trustworthiness" since treatment will depend on what is reported. Weinstein & Berger, *supra*, at 803-144. The two-part test set forth for admitting these hearsay statements is (1) "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment"; and, (2) "the content of the statement must be such as is reasonably relied on by a physician [17] in treatment or diagnosis." *United States v. Renville*, 779 F.2d 430, 436 (8th Cir.1985).

In *Renville*, the Court applied Rule 803(4) to an intra-family child abuse case such as the one at hand and permitted the physician to testify both to the victim's statements of abuse and to the victim's identity of her assail-

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[17] Statements to psychiatrists or psychologists are admissible under 803(4) the same as statements to physicians. The advisory committee note to Rule 803(4) states that "[u]nder the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Fed.R.Evid. 803(4) advisory committee's note. There is no reason to exclude psychiatrists or psychologists from this and the courts have not done so. *See*, Annotation, *Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment As Hearsay Exception Under Rule 803(4) of the Federal Rules of Evidence*, 55 A.L.R.Fed. 689, 699 (1981); *United States v. LeChoco*, 542 F.2d 84, 89, n. 6 (D.C.Cir. 1976) ("The defendant's statements to his psychiatrist fall within the statement to a physician exception to the hearsay rule embodied in Rule 803(4)").

ant. *Id.* The Court concluded that not only would the young victim have a motive consistent with the purpose of treatment, but also, "Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment." *Id.* at 436. We agree with the judgment of the Eighth Circuit that "[s]exual abuse of children at home presents a wholly different situation" from that normally encountered in Rule 803(4) cases and that situation requires great caution in excluding highly pertinent evidence. *Id.* at 437.

Defendants contend that Hilary's incompetence to testify as a witness in court renders her statements made for the purposes of diagnosis or treatment inadmissible. This argument must fail.

An individual's statements made for purposes of medical diagnosis or treatment have frequently been admitted into evidence regardless of whether that individual was competent to testify at trial. For instance, a physician has been allowed to testify to statements made by a victim of child abuse even though the child was only three years old and "could not have been subjected to cross-examination." *Nick*, 604 F.2d at 1201-1202. *See also United States v. Shaw*, 824 F.2d 601 (8th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1033, 98 L.Ed.2d 997 (1988) (Physician allowed to testify to statements made by nine year old victim); *United States v. DeNoyer*, 811 F.2d 436 (8th Cir.1987) (Social workers allowed to testify under 803(4) to statements made by a five year old victim); *Renville*, 779 F.2d 430 (Physician allowed to testify to statements made by eleven year old victim); *Iron Shell*, 633 F.2d 77 (Physician allowed to testify to statements made by nine year old victim).

The fact that a young child may be incompetent to testify at trial affects neither prong of the two-part test for admitting evidence under 803(4). First, a young

child will have the same motive to make true statements for the purposes of diagnosis or treatment as an adult. Indeed, at least one court has been influenced by the notion that this motive may be stronger on the part of the child: "The age of the patient [nine] also mitigates against a finding that [her] statements were not within the traditional rationale of the rule." *Iron Shell*, 633 F.2d at 84.

Second, the statements of a child are "reasonably relied on by a physician in treatment or diagnosis." *Renville*, at 436. A physician certainly does not cease to listen to a patient's complaints simply because that patient is a child. In fact, as noted by the court in *Renville*, a physician in determining treatment may rely on factors in child abuse cases such as an assailant's identity that would not be relied on were the patient an adult.

Hilary's statements for purposes of diagnosis or treatment should have been admitted into evidence regardless of her competency to testify at trial.

Defendant's contention that Hilary's statements to Dr. Harrison are inadmissible because Dr. Harrison was consulted in order to testify as a witness rather than for treatment is without merit. Rule 803(4) "abolished the [common-law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only in order to testify as a witness." *Iron Shell*, 633 F.2d at 83.[18] Dr. Harri-

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[18] *See also O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1089 (2d Cir. 1978) ("Rule 803(4) clearly permits" statements made to a non-treating physician); Fed.R.Evid. 803(4) advisory committee's note ("Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements weer not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one

son's testimony to statements made by Hilary are therefore admissible regardless of why he was consulted.

We find no reason to justify the exclusion of statements made by Hilary to Dr. Harrison. Such statements should have been admitted as statements made for the purposes of medical diagnosis or treatment under 803(4).

VI.

Defendants' Counter-claims and Cross-appeals

Defendants filed counter-claims against Dr. Morgan for defamation, publication of private facts, false light publicity, and intentional infliction of emotional distress arising out of publicity surrounding this litigation. The jury found for Dr. Morgan on defendants' counter-claims and defendants have appealed this judgment. Defendants have pointed to no error committed by the district court and the judgment in favor of Dr. Morgan on defendants' counterclaims is affirmed.

Additionally, defendants have cross-appealed from the district court's refusal to dismiss Dr. Morgan's claim for the intentional infliction of emotional distress. Defendants argue that Dr. Morgan failed to state a cause of action since she was never present when acts of abuse were perpetrated on Hiliary.

The requisite elements for a cause of action for the intentional infliction of emotional distress are delineated in *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974). *Womack* does not require, and defendants have pointed to no Virginia case, which would require that a

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most unlikely to be made by juries. The rule accordingly rejects the limitation"); Weinstein & Berger, *supra*, at 803-146 ("Rule 803(4)) rejects the distinction between treating and nontreating physicians"); Annotation, *supra*, note 17 at 692, ("[S]tatements made to a physician consulted only for the purpose of allowing him to testify are now admissible under the Rule.").

plaintiff such as Dr. Morgan be present during the outrageous conduct in order to recover for the intentional infliction of emotional distress. The district court acted properly in refusing to dismiss this cause of action.

Finally, defendants have cross-appealed from the district court's refusal to grant a directed verdict in favor of the grandmother, Doris Foretich. As counsel for plaintiffs agreed at oral argument that Doris Foretich could be dismissed from this action, this issue need not be further addressed.

Accordingly, the judgment of the district court is reversed and remanded in part and affirmed in part.

REVERSED AND REMANDED IN PART and AFFIRMED IN PART.

POWELL, Associate Justice, United States Supreme Court (Retired), concurring in part and dissenting in part.

I join Parts I-IV and Part VI of the court's well-reasoned opinion. As I have some doubt as to the admissibility of the testimony of the psychologist, Dr. Harrison, I write separately on that question. At the outset, I refer to the applicable standard of review when a district court's decision to exclude evidence is at issue.

A

Few cases are more difficult to try than one of child abuse where the child is very young and does not testify in court. Moreover, there is rarely a non-party witness to alleged child abuse, with the result that rulings on admissibility of evidence on behalf of the child are particularly sensitive. This was such a case, and it was tried by an able and experienced district court judge. It must be remembered that, in addition to assuring the fair presentation of a plaintiff's case, the district court has the responsibility of shielding defendants from the admission of unduly prejudicial evidence. This Circuit has recognized that a district court's determination to admit or exclude evidence is not to be disturbed unless it has "abused its discretion." *United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir.1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983). Accordingly, our review on this appeal is limited to a determination of whether the district court abused its discretion in excluding certain evidence offered on behalf of the appellants Hilary Foretich ("Hilary") and her mother, Dr. Elizabeth Morgan. As noted above, I am in complete agreement with the court's analysis and conclusion that the district court should have admitted evidence of the physical abuse of Hilary's half-sister Heather and certain out-of-court "excited utterances" made by Hilary to her mother. The district court's decision not to admit statements made by Hilary to the psychologist, Dr. Dennis Michael Harrison, Ph.D., presents a closer question. I write to address it.

B

The leading cases relied on by the court today are *United States v. Renville*, 779 F.2d 430 (8th Cir.1985) and *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). In these cases, and all the other cases cited by the court on this issue, the Eighth Circuit upheld the district court's evidentiary rulings. In this case the court disagrees with the court's evidentiary rulings below.

The court's holding that the district court abused its discretion in excluding statements made to Dr. Harrison by Hilary is based on an application of the analysis used by the *Renville* and *Iron Shell* courts in applying Fed.R. Evid. 803(4). Rule 803(4) contains a hearsay exception applicable to statements made to a physician for purposes of diagnosis or treatment.[1] At common law, this exception traditionally was based on a dual rationale. First, the declarant's purpose in making the statement normally assures its trustworthiness because diagnosis and treatment may depend on what the patient tells the physician. Secondly, a fact reliable enough to serve as a basis for a physician's diagnosis or treatment generally is considered sufficiently reliable to escape hearsay proscription. Thus, if the declarant's motive in making the statement is consistent with the purpose of promoting treatment, and the content of the statement is reasonably relied on by a physician in formulating a diagnosis or mode of treatment, then the statement presumptively is admissible.

Although the courts in *Iron Shell* and *Renville* would appear to allow the admission of statements made to a physician who is seeking a diagnosis in preparation for

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[1] No distinction has been made where the statements in question were made to a psychologist rather than a physician. *See* Fed.R. Evid. 803(4) advisory committee's note.

litigation, they explicitly hold that "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment. . . ." *Renville*, 779 F.2d at 436. *See also Iron Shell*, 633 F.2d at 84. In *Renville*, the court found that:

> Before questioning the child, [the physician] explained to her that the examination and his prospective questions were necessary to obtain information to treat her and help her overcome any physical and emotional problems which may have been caused by the recurrent abuse.

779 F.2d at 438. Therefore, "in the circumstances of this case, there was sufficient indicia of the declarant's proper motivation to ensure the trustworthiness of her statements to the testifying physician." *Id.* at 439. In *Iron Shell*, the court stated that "[w]e find no facts in the record to indicate that [the child's] motive in making these statements was other than as a patient seeking treatment." 633 F.2d at 84. Therefore, in each of these cases the court found that the statements met both prongs of the traditional common-law test.

A significant difference found in this case is that, at the time Hilary was questioned and examined by Dr. Harrison, she was only four years of age. There is no evidence in the record that her frame of mind was comparable to a patient seeking treatment. Moreover, in contrast to the circumstances in *Renville*, there is no evidence that Dr. Harrison ever explained to Hilary that his questions and relationship with her arose, at least in part, from a desire to treat her. Thus, an important element contributing to the reliability of "physician treatment" statements that was explicitly found to be present in both *Renville* and *Iron Shell*, i.e., the strong motive for the declarant to tell the truth in order to promote treatment, has not been established in this case. Absent a finding that Hilary made her statements believing they would be used by Dr. Harrison to help her,

I am reluctant to rest my decision on the cases relied on by the court.

In light of the facts before the court in this case, I think it is preferable to rely on a strict application of Rule 803(4) of the Federal Rules of Evidence. Rule 803(4) appears to have abolished the common-law distinction between those statements made while consulting a "physician" for purposes of examination and statements made while consulting him for purposes of testifying as a witness. The Second Circuit has held that, in light of the Advisory Committee Notes to Rule 803(4), so long as the statements made by an individual were relied on by the physician in formulating his opinion, they are admissible. *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1089 (2d Cir.1978). *See also* Weinstein & Berger, Evidence ¶ 803(4) [01]. Although this holding ignores the traditional common-law prong of the rule that requires that the statements be made for the purposes of seeking treatment, it has clear support in the Advisory Committee Notes to Rule 803(4).[2]

It is appropriate to recognize, however, that evidence admitted under the standard discussed by the Second Circuit and the Advisory Committee Notes has less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule. The professional objectivity of a physician responsible for treatment may well be greater than

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[2] These Notes explain that, at common law, statements made to a physician consulted only for the purpose of enabling him to testify were not admissible as substantive evidence. Rule 803(4) rejects this limitation because a physician, as an expert, is allowed to state the basis of his opinion, including statements of this kind. This calls for a distinction that juries are unlikely to make, and therefore the limitation has been abolished.

In a civil case, where there is no Confrontation Clause problem, it was within Congress' discretion to approve a rule authorizing the admission of whatever evidence it thought appropriate, absent a due process violation.

that of a witness employed and paid to testify as an expert. More importantly, the veracity of the declarant's statements to the physician is less certain where the statements need not have been made for purposes of promoting treatment or facilitating diagnosis in preparation for treatment. In my view, an appellate court should be reluctant to disturb the discretion of a district court that has excluded such testimony on the ground that its prejudicial effect outweighs its probative value. *See* Fed.R.Evid. 403. But in this case, the reasons for exclusion by the district court are not clear. In excluding Dr. Harrison's testimony as to what Hilary told him, the court appeared to rely, without further elaboration, only on the facts that "[Hilary] isn't here and her age and the circumstances of the case." (J.A. at 115). In light of Rule 803(4), and the importance of these statements to appellants' case, these reasons are insufficient to justify exclusion of the evidence.

Rather than conclude, however, that Dr. Harrison's testimony should have been admitted into evidence, I would leave this question for reconsideration at the retrial of this case, if there should be a retrial.

[Rec'd Sep. 17, 1987]

DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 87-987

Superior Court C.A. No. D 684-83

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

BRIEF IN SUPPORT OF APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (FAMILY DIVISION)

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* * * *

IV. THE TRIAL COURT'S DENIAL OF A PUBLIC TRIAL ON THE CONTEMPT CHARGES IS REVERSIBLE ERROR.

The trial court's denial of Dr. Morgan's motion for an open contempt hearing is reversible error. As we show below, Dr. Morgan has a right under the Fifth and First Amendments to have her trial on these contempt charges open to the press and public. No "overriding" or "compelling" governmental interest supports closure of any part of a proceeding in which Dr. Morgan's liberty is at stake. In particular, there is no "family law" exception to these constittuional mandates. On the contrary, the rationale for openness is especially strong in this case, which draws into question the ability of the judicial system generally to assess charges of sexual abuse and in which a strong claim of bias has been lodged against the trial judge. Furthermore, concern for Hilary Foretich's future reputation, heretofore asserted as a justification for closure, has far less weight today in view of the extent to which details of this case have been placed on the public record in a related proceeding.

By applying the closure order to Dr. Morgan's contempt proceding, the trial court denied Dr. Morgan her Fifth and First Amendment rights to a public hearing. As a result, Dr. Morgan was jailed—and remains in jail—on the basis of a secret trial. The infringement of Dr. Morgan's constitutional right to an open trial is

even more serious because she remains subject to a highly restrictive gag order that further prohibits her from making public the merits of her defense. The First Amendment bars a court from preventing dissemination of information not acquired through the judicial process. The breadth of the gag order is without even colorable justification.

A. Dr. Morgan Has A Fifth Amendment Due Process Right To A Public Contempt Hearing

In *In re Oliver*, 333 U.S. 257 (1948), the Supreme Court held that a person accused of contempt before a grand jury has a due process right to have his contempt hearing open to the public. In holding that considerations of grand jury secrecy would not carry forward to a trial for contempt, the Court pointed out that the contempt proceedings must be "measured . . . by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both." *Id.* at 265. The Court said:

> In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison. *Id.* at 273.[49]

Oliver involved a criminal contempt, but the Supreme Court made clear that its holding would be equally ap-

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[49] The Court reviewed "the traditional Anglo-American distrust for secret trials . . . variously ascribed to the notorious use of this parctice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber and to the French monarchies' abuse of the *lettre de cachet*." *Oliver* at 268-269 (footnotes omitted). The Court also underscored the absence of any authority in "the history of this country" for *in camera* criminal proceedings. Id. at 266.

plicable to civil contempt proceedings, observing that "characterization" of the proceedings as civil or criminal "is not material in resolving this due process question." *Id.* at 266 n.13. (citations omitted).

As the Second Circuit said in *In re Rosahn*, 671 F.2d 690, 696 (2d Cir. 1982):

> It is significant that the contempt sentence overturned by the *Oliver* Court on the ground that the contempt proceeding below had been improperly closed to the public was a conditional jail sentence that would have terminated upon compliance with the trial court's order. Accordingly, the *Oliver* analysis was applied to invalidate a contempt sanction whose central characteristic—its conditional nature—is typical of a *civil* contempt.

In holding that those charged with civil contempt have a right to a public hearing, the Second Circuit stated:

> Given the burden that imprisonment imposes on an individual, a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system. *Id.* at 697.

Whatever justification may have existed for closure of the custody and visitation rights hearings that spawned the present contempt charges, *In re Oliver* gives Dr. Morgan a due process right to an open proceeding when she faces the threat—now realized—of incarceration. *See also Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971); *Bloom v. Illinois*, 391 U.S. 194, 205 (1968).

B. Dr. Morgan Has A First Amendment Right To A Public Contempt Hearing.

Dr. Morgan also has a separate First Amendment right to a public contempt hearing. In *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555, 573 (1980), the Supreme Court found that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The Court concluded that a trial courtroom "is a public place where the people generally —and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Id.* at 578. It held "that the right to attend criminal trials is implicit in the guarantees of the First Amendment" and that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Id.* at 580-581.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Supreme Court reaffirmed the First Amendment right of access recognized in *Richmond Newspapers* by striking down a Massachusetts statute that mandated exclusion of the press and public during testimony of minor victims in a rape trial. The Court emphasized how "limited" was the exception to the right of access: "[T]he State's justification in denying access must be a weighty one . . . necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest . . . ." *Globe* at 606, 607. Similarly, in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), where the Court upheld a First Amendment right of access to *voir dire* examinations of prospective jurors, it again stressed that "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values . . . ." *Id.* at 510. *See also Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986) (access to preliminary hearing).

In *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982), the Third Circuit aptly summarized the underpinnings of the First Amendment right of access to judicial proceedings:

> The *Richmond Newspapers* Court found open court proceedings to be mandated by at least six societal interests. First, public access to criminal proceedings promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system. This public access, and the knowledge gained thereby, serve an important "educative" interest. Second, public access to criminal proceedings gives "the assurance that the proceedings were conducted fairly to all concerned" and promotes the public "perception of fairness." Public confidence in and respect for the judicial system can be achieved only by permitting full public view of the proceedings. Third, public access to criminal proceedings has a "significant community therapeutic value" because it provides an "outlet for community concern, hostility, and emotion." Fourth, public access to criminal proceedings serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality. Fifth, public access to criminal proceedings enhances the performance of all involved. Finally, public access to criminal proceedings discourages perjury. (Citations omitted) [50]

Richmond Newspapers involved a criminal trial, but the plurality noted that "historically both civil and crim-

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[50] *See also, United States v. Edwards*, 430 A.2d 1321, 1344-45 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *United States v. Burka*, 289 A.2d 376, 378 (D.C. App. 1972) ("the general nature of our form of government requires the highest degree of public exposure to trial court proceedings," and "the underlying policy firmly rooted in our judicial system [is] that courtroom proceedings must be public and open").

inal trials have been presumptively open." 448 U.S. at 580 n.17. As the Supreme Court observed in *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979), "many of the advantages of public criminal trials are equally applicable in the civil trial context." In *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the Sixth Circuit said that "The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial" and in *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1061 (2d Cir. 1984), the Second Circuit held that, "[T]he First Amendment does secure a right of access to civil proceedings."

Absent a showing of some "compelling" or "overriding" governmental interest in closure, therefore, Dr. Morgan —and the public—have a First Amendment right to an open contempt hearing. As we demonstrate below, no such "compelling" or "overriding" interest exists.

C. There Is No Justification To Close The Contempt Trial.

No interest justified closure of the contempt trial in this case. Under the First Amendment, closure can be sustained only if it is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe* at 607. Dr. Morgan's Fifth Amendment right to an open hearing is of an even higher order, and *Oliver* does not suggest that it is subject to any balancing test. At the very least, that right could be overcome only by a showing of compelling governmental interest. No such interest exists in this case. In particular, the fact that this contempt arises out of a family law proceeding and involves a minor child, justifications which the Court of Appeals previously relied on, did not justify closure in this case.

1. The Court of Appeals Misconstrued The Scope Of Dr. Morgan's Constitutional Rights To An Open Hearing.

In sustaining the closure of Dr. Morgan's prior contempt hearing, this Court misconstrued the scope of the constitutional right to an open contempt hearing. *Morgan v. Foretich*, 521 A.2d 248 (D.C. App. 1987). In that case, the Court acknowledged that a civil contemnor has a Fifth Amendment right to a public hearing, but refused to apply the presumption of openness enunciated in *Oliver*:

> The presumption of openness and the standard for closure that apply in criminal cases, where the constitutional threshold for closure is highest, do not apply to the evidentiary phase of a civil contempt hearing in a child custody and visitation rights case. A less stringent standard is applicable to the instant case. *Id.* at 252 (footnote omitted).

Noting that it was "writ[ing] on a clean slate," the Court of Appeals reasoned that Family Division proceedings did not have the same tradition of openness as criminal or non-family civil cases. The Court concluded that "[s]ince custody and visitation rights determinations are based on an analysis of 'the best interest of the child,' and since the evidentiary phase of civil contempt proceedings adjudicating violation of visitation orders necessarily implicates the child's interests, a presumption of openness would be inappropriate." *Id.* at 253. It remanded the case so that Judge Dixon could make findings to support the "qualified constitutional right" recognized by the Court of Appeals.

On remand Judge Dixon retroactively justified closure of the hearing, primarily on the ground that disclosure of the "graphic descriptions of alleged acts . . . by and to the minor child" would damage the child's reputation and would not be in her best interests. The Court of Appeals

affirmed. *Morgan v. Foretich*, No. 86-1137, slip op. (D.C. App. June 30, 1987). It found support for its conclusion in the Supreme Court's decision in *Globe Newspaper Co.* suggesting that limited closure might be appropriate in certain circumstances in order to protect a minor victim-witness in a sex crime trial.

The Court of Appeals panel seriously misapplied the Supreme Court precedents requiring open trials. Nothing in those cases suggests a special "less stringent" constitutional rule for "family law" contempts, especially where incarceration is a possible result.[51] In particular, Dr. Morgan is not aware of any case in which a court has closed a contempt hearing on the rationale that allegations of sexual abuse were at issue.

On the contrary, the lesson of *In re Oliver* and its progeny is that no matter what considerations justify secrecy in the proceedings that give rise to the alleged contempt, they must give way to the requirement of openness in the contempt hearing itself. As the Supreme Court observed in *Oliver*:

> Many reasons have been advanced to support grand jury secrecy . . . but those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. *In re Oliver*, 333 U.S. 257 at 264.

That observation applies with equal force here. In short, it is the character of the proceeding at hand, not its subject matter, that triggers the constitutional protection.[52]

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[51] Such a rule would fly in the face of a growing body of cases ratifying the applicability of due process considerations to family matters. *See e.g., In re Gault*, 387 U.S. 1 (1967). *See also Parham v. J.R.*, 442 U.S. 584 (1979).

[52] Indeed, D.C. Code Ann. § 16-2316(e) (1981), which governs Family Division proceedings regarding delinquency, neglect or need

The Court of Appeals' reliance on *Globe Newspaper Co. v. Superior Court* is also misplaced. There the Supreme Court acknowledged the legitimacy of concerns for the physical and psychological well being of a minor witness, who was the victim of a sex crime, and suggested that, on a case-by-case basis, a court could constitutionally bar the press from such a child's testimony. The Court, however, held that a general rule mandating closure of such testimony is unconstitutional. The limited exception recognized in *Globe* does not justify closure of Dr. Morgan's contempt trial for two reasons.

First, the question of the child's testimony does not arise in this case. Hilary did not testify in any of the hearings to date and did not do so in the contempt hearing. The asserted concerns for Hilary's reputation are inchoate. They relate to possible harmful effects to her reputation later in life. They do not constitute the sort of direct and immediate "trauma and embarrassment" to a child who testifies as contemplated by *Globe Newspaper*. *Id.* at 607. The narrowness of the *Globe* exception is plain from the fact that, as far as we are aware, only one court has relied on *Globe* to close a hearing during the testimony of a witness in order to protect her from trauma or embarrassment, and we know of no case that relies on *Globe* to justify closure in order to protect the interest of a nontestifying person.[53] While specula-

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of supervision, expressly excludes contempt hearings from the closure rule it otherwise announces. D.C. Code Ann. § 16-2344 (1981), which does permit the Court to close certain proceedings at the request of either party, should not be read to include contempt proceedings. As the Court of Appeals recognized, an interpretation of § 16-2344 that would include contempt proceedings would arise questions about its constitutionality. 521 A.2d at 250, n.7.

[53] *State v. Workman*, 14 Ohio App. 3d 385, 471 N.E.2d 853, 859-60 (1984) (in a case of attempted rape of two minor victims, court

tive concern for future reputation may justify closing the doors of a Family Court proceeding, it does not remotely approach the kind of "compelling" or "overriding" governmental interest sufficient to close a trial in which Elizabeth Morgan's liberty is at stake.

Second, the scope of the closure in this case goes far beyond the limited closure approved in *Globe*. In *Globe*, the Court held that the testimony of a victim-witness could be taken *in camera* under limited circumstances. Here, as we show further below, the current closure order required virtually all of Dr. Morgan's defense to be taken in secret. *See* p. 87, *infra*.

2. The Rationale Justifying Closure Of The Prior Contempt Hearing No Longer Applies

Even under the rationale of the prior Court of Appeals decisions in this case, the trial court erred in closing the current contempt hearing. First, Hilary's putative interest in privacy is now moot, because much of the information is in the public domain as a result of the civil suit in Virginia. *See* n. 39, *supra*. That three-day trial, which dealt with details of Hilary's abuse, was thoroughly covered by the press. Briefs that raise, *inter alia*, exclusion of evidence concerning Dr. Foretich's abuse of his daughter Heather also have been publicly filed. The mass of information about these allegations now in the public domain has mooted the alleged concern for privacy.

Second, Dr. Morgan made her request to open these proceedings at their outset. In the contempt case ruled on by the Court of Appeals, her request came only after weeks of testimony. The Court of Appeals concluded that the trial court was correct in its appraisal that opening only the last portion of the hearing for Elizabeth

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closed hearing during their testimony because of their considerable nervousness about testifying).

Morgan's defense would have been unfair to Dr. Foretich. That equitable consideration does not apply here.

D. The Rationale For Open Hearings Is Uniquely Applicable To This Case.

Several of the most important justifications for open judicial hearings—promotion of informed discussion of public affairs and protection against judicial abuse—apply with special force to this contempt hearing.

In recent years, there has been increased public awareness of and interest in child sexual abuse, the prevalence of which has been historically ignored and wrongly denied. How well equipped courts of law are to deal with allegations of sexual abuse, especially when the charges include incest with very young children, is a matter of profoundly important public policy that is squarely raised by Elizabeth Morgan's defense to the charge of contempt. Is it legitimate, for example, for a court not to hear from a child on grounds that she is too young to testify in the traditional sense? What are the roles of experts in child sexual abuse proceedings? Who really are the most qualified experts in child sexual abuse proceedings —classic child psychiatrists or psychologists and protective service workers who specialize in the field? Is a child's apparent affection for the alleged abuser evidence of the falsity of the charges or, rather, a reflection of the hostage's well known psychological attachment to his captor? Can a very young child be coached to fabricate stories of sexual abuse and to maintain the lie effectively?

All of these questions are raised by the instant case and are among the difficult issues facing courts across the country as they struggle to apply legal norms to conduct that implicates society's oldest taboos. How well courts perform that task—whether courts are suited to perform that task at all—are matters of great public concern. But it is a judgment the public cannot make if

it is barred from the process. As the Supreme Court said in *Globe Newspaper Co.*, "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." 457 U.S. at 604-05.

Public access is also particularly important in this case because a powerful recusal motion has been lodged against Judge Dixon alleging that his mind has been closed on the issue of sexual abuse, and that he has demonstrated a disbelief in Elizabeth Morgan's credibility and a punitive willingness to find her in contempt.

As the Supreme Court has recognized, such improper judicial motives flourish in secrecy, and it is the purpose of public trials to inhibit them:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. *In re Oliver*, 333 U.S. 257 at 270 (footnote omitted).

As Jeremy Bentham observed long ago with respect to the need for public monitoring of the performance of judges. "[W]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." 1 Bentham, *Rationale of Judicial Evidence* 524 (1827), cited in *In re Oliver*. *Id.* at 271.

As the Sixth Circuit Court of Appeals recently held, the importance of public scrutiny of judicial conduct requires not only that the trial itself be open, but also that proceedings and records relating to a motion for recusal be open. "When a judge's impartiality is being

questioned, it strengthens the judicial process for the public to be informed of how the issue is approached and decided." *National Broadcasting Co. v. Presser*, No. 86-3735, slip op. at 17 (6th Cir. July 31, 1987). Otherwise, the public can never have confidence that justice is being done. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

E. Dr. Morgan Was Denied Her Constitutional Right To A Public Hearing On Her Claim Of Bias And Her Defense To The Charge Of Contempt.

Because the trial court applied the closure order to Dr. Morgan's contempt proceeding, she was denied her Fifth and First Amendment rights to an open hearing on her claim of bias and her defense to the charge of contempt. As a result, she was, and remains, incarcerated on the basis of a secret trial.

The closure order at issue bars public reference to any specific sexual abuse allegation. As Judge Dixon correctly observed, the allegations of sexual abuse "are inextricably intertwined with every phase of these proceedings." Memorandum Opinion and Order (11/26/86), at 4, Ex. Tab 30. The closure order thus barred Dr. Morgan from testifying in public about the evidence in support of the allegations of sexual abuse. After six preliminary questions, as soon as Dr. Morgan began to describe her reasons for believing that Dr. Foretich sexually abuses Hilary, Judge Dixon required the courtroom to be closed. Tr. 27-28 (8/26/87). That testimony, which Dr. Morgan was forced to give in a secret session, lies at the heart of her defense to contempt and her claim of judicial bias.

In support of her claim of bias and in defense against the charge of contempt, Dr. Morgan also relied on all information that she has acquired over the past years

that support her belief that Dr. Foretich sexually abuses Hilary. Much of that evidence is of record in prior proceedings in the underlying visitation/custody hearings conducted by Judge Dixon in 1985, 1986, and 1987. Those prior proceedings have included 43 days of hearings over the course of two years, the testimony of approximately 75 witnesses and 4,000 pages of transcripts. Because of the closure order, virtually all evidence of sexual abuse elicited in these hearings has all been taken in secret session, and the transcripts, exhibits, and pleadings remain under seal. Because that evidence is integral to Dr. Morgan's claim of bias and her contempt defense, so long as it remains under seal, her right to an open trial remains a nullity.

Dr. Foretich's assertion that Dr. Morgan was not denied her right to an open contempt trial is wrong. Dr. Foretich argues that Dr. Morgan could have presented her defense in a public hearing by simply referring to—without describing—the evidence of sexual abuse admitted in prior hearings. Opposition To Initial Hearing *En Banc* (Aug. 27, 1987), at 3-5. In effect, Dr. Foretich contends that Dr. Morgan could have had an open trial by testifying publicly that "for all the reasons previously presented in the closed hearings in 1985, 1986, and 1987, as well as other similar evidence of which I am aware, I believe that the extended visitation would have endangered Hilary and that Judge Dixon denied me a fair trial."

That theory makes a mockery of the constitutional right to a public trial. For Dr. Morgan's right to a public trial to be meaningful, she must have the opportunity to present, and the public must have the opportunity to hear and assess, the credibility of the facts on which her claim of bias and her defense of necessity depend. Accordingly, the public must have the opportunity to hear and decide for itself whether Dr. Shubin, Dr. Palumbo, Dr. Froning, and Dr. Corwin—together with all the other evidence—support the conclusion that sexual abuse

is ocurring. The right to an open hearing is a sham if it is reduced, as Dr. Foretich would have it be, simply to referring publicly to the existence of secret facts.

F. The Present Gag Order Restricting Dissemination Of Information About This Case Constitutes An Unconstitutional Prior Restraint.

In addition to Dr. Morgan's Fifth and First Amendment rights to an open hearing, she has a separate First Amendment right to disseminate information about this case. The closure order constitutes an unconstitutional prior restraint, at least insofar as it limits Dr. Morgan's right to communicate information learned independently of the court's processes. The prior restraint has particularly adverse consequences in this case because it further insulates the contempt proceeding from public scrutiny.

The current closure order provides, in relevant part,

> There shall be no discussion, production or publication of documents, medical records, records of proceedings, records of testimony, records of evidence, photographs, videotapes, recordings or images [regarding a specific sex abuse allegation.] Order Amending Public Disclosure Restrictions (Apr. 13, 1987).

By its terms, the order prohibits disclosure not only of court proceedings and other information acquired with the aid of the court's legal processes, but also any information documenting the sexual abuse of Hilary by her father—including medical and psychiatric reports, affidavits of experts, and accounts of the spontaneous statements of Hilary—regardless of how acquired.

The extraordinary attempt by Judge Dixon to foreclose both discussion and disclosure of any documents corroborating the sexual abuse, even if the information was acquired independently of the court's processes, far exceeds the permissible extent of judicial protective orders and amounts to an unconstitutional prior restraint on free speech.

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

No. ——

JEAN ELIZABETH MORGAN,
Appellant,

v.

ERIC A. FORETICH,
Appellee.

AFFIDAVIT OF CARYLE MURPHY

CARYLE MURPHY, being duly sworn, deposes and says as follows:

1. I am, and for three years have been, a reporter in the Alexandria Bureau of The Washington Post.

2. In February 1987, I attended and covered a four-day trial in the federal court in the Eastern District of Virginia. The trial arose out of Elizabeth Morgan's claim that her former husband, Eric Foretich, and his parents had sexually abused Morgan's four-year old daughter.

3. All proceedings at the trial were conducted in public. There was extensive and explicit testimony in graphic detail about the alleged sexual abuse of the child. Examples of the testimony heard at trial are attached hereto as Exhibit 1. These excerpts are from transcripts of the testimony at the Virginia proceeding. Those transcripts are a part of the public record on appeal in the United States Court of Appeals for the Fourth Circuit (filed July 31, 1987) and are in the possession of the Post.

/s/ Caryle Murphy
CARYLE MURPHY

Subscribed and sworn to
before me on this 20th day
of January, 1988.

/s/ Allen Foundhold
Notary Public
My commission expires: 6-30-91

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 87-2549(L), 87-2550,
87-2558, 87-2559

ELIZABETH MORGAN, *et al.*,
Appellants-Plaintiffs,

v.

ERIC A. FORETICH, *et al.*
Appellees-Defendants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

JOINT APPENDIX
Volume I

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-0944-A
Civil Action No. 86-0945-A

ELIZABETH MORGAN, *et al.*,
Plaintiffs,

v.

ERIC A. FORETICH, *et al.*,
Defendants.

TRIAL PROCEEDINGS

VOLUME I

Before: HONORABLE RICHARD L. WILLIAMS
United States District Court Judge
AND A JURY

February 17, 1987
Alexandria, Virginia

Appearances:

JAMES E. SHARP, ESQ.,
V. THOMAS LANKFORD, ESQ.,
MARK M. KATZ, ESQ.,
RICHARD L. DUCOTE, ESQ.,
T. RAWLES JONES, ESQ.,
For the plaintiffs

THOMAS E. ALBRO, ESQ.,
MELVIN J. GUYER, ESQ.,
CHRISTINE D. THOMPSON, ESQ.,
For the defendants

VICTORIA V. HALASZ
Official Court Reporter

* * * *

[17]three minutes to emphasize some facets of his experience for the jury.

THE COURT: But what area are you offering him now?

MR. DUCOTE: He will be offered as an expert in the field of child psychology with particular emphasis on child sexual abuse.

THE COURT: All right. Well, now, how does that conform to the Court's prohibition against using more than one expert in the same discipline?

MR. DUCOTE: This is the psychological aspect of the validation process, Your Honor.

THE COURT: Get his identity, and I will give the jury further instructions.

DENNIS MICHAEL HARRISON
was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DUCOTE:

Q State your full name and address.

A Dennis Michael Harrison, PhD. My address is 5401 Twin Knolls Road, Suite 9, Columbia, Maryland 21045.

Q And your profession?

* * * *

[86] A Yes.

Q What is your opinion about that?

A Well, the child has been sexually abused in the vaginal area, her anal area, her mouth; to be graphic, she has been penetrated vaginally. She has described fingers—

MR. ALBRO: Your Honor, I think we better have a side-bar conference.

THE COURT: What's your objection?

MR. ALBRO: It's going to be a hearsay objection, Your Honor, if he is going to repeat—

THE COURT: Well, here again, counsel, refine your questions so that you get a precise, responsive answer, and that the question doesn't permit the things that Mr. Albro has some concern about.

And, Dr. Harrison, you are requested to give a very short, responsive answer to these very precise questions, and don't you elaborate.

Proceed.

THE WITNESS: Thank you, Your Honor.

BY MR. DUCOTE:

Q Just specifically, Dr. Harrison, what is your opinion about the nature of the sexual abuse that she has endured?

A The child has had penis penetration, fingers [87] penetrate her, other objects penetrate her in her vagina, vaginal area; objects or even parts of bodies stuck in her rear end; she calls it her hiney. She has had penis stuck in her mouth. She has been masterbated on. She has had sperm in her hair and face and nose; describes it on her body.

Q And, Doctor, do you have an opinion as to who perpetrated that abuse upon her?

A Yes.

Q Within a reasonable degree of psychological certainty?

A Yes.

Q What is your opinion, Doctor?

A That her father has, and her maternal grandparents, Doris and Vincent Fortich have.

MR. DUCOTE: At this point, Your Honor, we have a demonstrative exhibit that allows the witness to explain the way these evaluations are conducted, and I would ask that we be allowed to move that in front of the jury.

THE COURT: Has it been exhibited to you?

MR. ALBRO: I don't know which one it is, Your Honor. I think we probably need to be heard.

THE COURT: All right; fine. Here again, we can't conclude this witness before lunch, so suppose I now declare a luncheon recess with the jury, and then I will

* * * *

[151] Q And you have talked about what the specific acts of abuse are? Isn't it true, Doctor, that in formulating your opinion about who the abusers are and what they did that Doris Foretich's abuse in your opinion is that she watched?

A Watching someone having something stuck up their rear-end is sex abuse in any state of the country. The child talks about—

Q Was the answer to the question yes?

A You better believe it.

Q Thank you.

A You better believe.

Q It's also your opinion that she tried to stop the abuse; isn't that true?

A She chastised Vincent for having rectal intercourse with Hilary.

Q But she tried to stop it; is that what you are telling me? Is that the answer?

A She also spanked Hilary and said she asked for it.

MR. ALBRO: I didn't ask him to repeat hearsay.

Q Is it your opinion that she tried to stop the abuse? Yes or no?

A On one specific occasion, yes. It offended

* * * *

[159] THE COURT: Call your next witness.

MR. SHARP: Plaintiff calls Elizabeth Morgan.

THE COURT: Come forward and be sworn.

Hold the Bible, will you please?

MR. SHARP: May it please the Court.

THE COURT: Proceed.

ELIZABETH MORGAN
was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. SHARP:

Q Would you please state you full name to the jury?

A Yes.

It's Elizabeth Morgan.

THE COURT: Marshal?

THE WITNESS: It's Elizabeth Morgan.

THE COURT: Marshal, hand the witness a glass of water, will you please?

BY MR. SHARP:

Q How old are you, ma'am?

A I am 39.

Q And are you married?

* * * *

[200] BY MR. SHARP:

Q You are at liberty if you would act what you saw what about you witnessed.

A Well, she would rub herself in her genital area a lot. She would just sit there and rub herself. And then she would look sad, and she would cry, it seems. And

then she went through a period where she took her food, she took bacon—

Q Bacon?

A Bacon and lettuce and cookies and she tried to put them inside her vagina. And sometimes she would act as though it was a game, and sometimes she would act as though it was scarey.

And then she would she would try to, you know, to put things in me. And she would try to—when I kissed her goodnight, she would open her mouth and stick out her tongue and want me to kiss her like that.

And she—once I bought a—I wanted to buy her a toy. There was some stuffed things, and she chose a toy banana, and then she took it and rubbed it between her legs. And then she began to make panting sounds, and then she went uh-uh-uh, and then she fell over and she pounded her hands and she said, "Damn it. Damn it." And then she turned over on her back and rolled her eyes up. And she is afraid of going to the bathroom.

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-737

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-737

JEAN ELIZABETH MORGAN,
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v.

ERIC A. FORETICH,
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On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Dr. Eric A. Foretich, respectfully prays that Dr. Elizabeth Morgan's petition for a writ of certiorari to review the August 5, 1988, opinion of the District of Columbia Court of Appeals be denied.

STATEMENT OF THE CASE

This case should be simply a custody and visitation dispute concerning Hilary, the daughter of Dr. Eric Foretich and Dr. Elizabeth Morgan. However, because of Dr. Morgan's repeated accusations that Dr. Foretich abused Hilary, this case has grown to a "size apparently unequaled in a District of Columbia domestic relations proceeding." *Morgan v. Foretich*, 546 A.2d 407 (D.C.App. 1988) at 410. In spite of Dr. Morgan's persistent claims of sexual abuse, her allegations have not been proven.

Id. Yet, Dr. Foretich's battle to see Hilary continues, and this petition for *certiorari* is merely one of a number of tactics by Dr. Morgan to keep the litigation ball rolling and her own image in the public eye.

It is easiest to understand this petition by reviewing only the facts immediately involving it, rather than risking confusion by giving a broad brush description of the entire saga. Indeed, the panoply of issues, orders and appeals presented by Dr. Morgan in her petition seems to represent an attempt to bring more before this Court than is procedurally permitted.

On August 19, 1987, Judge Herbert B. Dixon, Jr., of the District of Columbia Superior Court, ordered a visit for Hilary with her father, Dr. Foretich, from August 22 through September 6, 1987, prior to Hilary's returning to school on September 8. Dr. Foretich's visits with Hilary had been for one hour, gradually increasing to week-ends, before the August 19, 1987, order. *Morgan v. Foretich*, 546 A.2d at 409.

Dr. Morgan's emergency motion for a stay of the visitation order pending appeal was denied by the District of Columbia Court of Appeals on August 21, 1987. Then, Dr. Morgan refused to comply with the visitation order by hiding Hilary. To this day, Dr. Foretich does not know where Hilary is or if she is safe.

On August 24, Judge Dixon issued an order to show cause why Dr. Morgan should not be held in contempt. Also on August 24, Dr. Morgan moved to recuse Judge Dixon, and to open the contempt hearing to the public, to unseal the record and to modify a closure order of April 13, 1987. After a contempt hearing on August 26, 1987, Judge Dixon found Dr. Morgan in contempt and ordered her to be incarcerated, as of August 28, 1987, until she would produce Hilary. Dr. Morgan has adamantly refused to produce Hilary and remains incarer-

ated in the D.C. Jail. On August 27, 1987, Dr. Morgan appealed the contempt judgment.

The appeal was argued before a panel of the District of Columbia Court of Appeals on April 25, 1988, and a published opinion was decided on August 5, 1988, with the court ruling on five issues. On the "principal issue," *Morgan v. Foretich*, 546 A.2d at 410, the court ruled it was not an abuse of discretion for the trial court to order the two-week visitation, because Dr. Morgan's allegations of sexual abuse had not been proven.

The court dealt with the other four issues in fairly brief form. The court rejected Dr. Morgan's claim of a defense of necessity to the contempt charge. Next, the court found that the record did not indicate that Judge Dixon should be recused, noting that Dr. Morgan's argument about bias was "significantly brought into question" because of her failure to raise it during earlier hearings. *Morgan v. Foretich*, 546 A.2d at 412. Further, the court declined to revisit the issue of closure of the August 26 contempt hearing, explaining that the court's two previous opinions, *Morgan v. Foretich*, 521 A.2d 248 (D.C.App. 1987) and *Morgan v. Foretich*, 528 A.2d 425 (D.C.App. 1987), were about the same issues. *Morgan v. Foretich*, 546 A.2d at 412. The court stated that a "good portion" of the August 26 contempt hearing was open, and the only part that was closed was Dr. Morgan's testimony when she "insisted upon reciting allegations as to specific acts of sexual abuse" on Hilary. *Id.* The court recently reemphasized its distinction that closure issues in family cases involve "special considerations." *Id.*, citing *Mokhiber v. Davis*, 537 A.2d 1100, 1108 n.8, & 1115-16 n.13 (D.C.App. 1988). Finally, the court stated that the $200,000 security posted as an appearance bond in 1986 could not be forfeited for failure to comply with the court orders of August 1987. Thus, the trial court's rulings were affirmed on all but the decision to forfeit the security. On August 30, 1988, Dr. Morgan's

motion to stay the mandate pending application for a writ of certiorari was denied, and the petition was filed in this Court on November 3, 1988.

REASONS FOR DENYING THE WRIT

I. Dr. Morgan's petition refers to issues, orders and opinions which are not properly before this Court. The petition does not define clearly issues which this Court can rule on.

This petition makes up in hyperbole what it lacks in specificity. As mentioned above, the myriad issues delectably thrown to this Court give the impression that it faces a feast of analysis. Just the opposite is the case. Dr. Morgan deftly tries to obscure the reality that there is very little about which she can properly petition this Court.

It will be helpful to illustrate some of the vague and confusing statements, to set the record straight—so to speak. First is the matter of the closure order. Dr. Morgan defines "the closure order," petition at 3, as the order issued by Judge Mencher on November 8, 1984. Clearly, a 1984 order is not reviewable in 1988. Unfortunately, although Dr. Morgan has defined "closure order," she uses that term in the petition to refer to a variety of such closure orders. According to Dr. Morgan, petition at 5, Judge Dixon clarified the November 8, 1984, closure order on November 26, 1986. Then, on April 13, 1987, Judge Dixon amended the November 26, 1986, order. Petition at 7. Dr. Morgan refers again to the closure order in petition at 9 n.10 and at 12 n.17.

This discussion of various closure orders is fine, but a "closure order" was not on appeal. The D.C. Court of Appeals very clearly described what it was reviewing in *Morgan v. Foretich*, 546 A.2d at 412 n.15. It explains that, although Dr. Morgan raised issues about the April 13, 1987, closure order, that order was not appealed and,

therefore, was not before the D.C. Court of Appeals. Dr. Morgan seems to be asserting that, because she raised the issues in her Brief to the D.C. Court of Appeals, they were "on appeal." Petition at 12 n.17. It is obvious that mentioning an issue in a brief does not transform it into a matter on appeal, when either the order from below was not appealed or the court below gave no order on that issue. Thus, the D.C. Court of Appeals points out that Dr. Morgan's motion to unseal the record and modify the closure order of April 13, 1987, were not ruled on by the trial court until September 18, 1987. Dr. Morgan's appeal was taken on August 27, 1987, and there was no appeal to the September 18, 1987, order. *Morgan v. Foretich*, 546 A.2d at 412 n.15. Once again, Dr. Morgan attempts to negate her failure to appeal the September order by lumping it in with her August 27 appeal of Judge Dixon's contempt order. Petition at 9 n.10 and at 12 n.17.

Since the D.C. Court of Appeals expressly found that the September order on unsealing the court record and modifying the closure order were not appealed from, Dr. Foretich submits that Dr. Morgan's assertion as to what issues have been appealed and may be reviewed by this Court cannot be credited. In what may seem like word games, but really is not, the D.C. Court of Appeals expressly stated that the issue on appeal was the denial on August 26 of Dr. Morgan's motion to *open* the hearing, rather than any *closure* order. Thus, even though Dr. Morgan describes the "closure order" in her Reason For Granting The Writ, in fact, there is *no closure order* to be reviewed. Equally confusing is the reference to Judge Dixon's application of the "closure order" to "transcripts and records of related proceedings, and to the parties' out-of-court statements." Petition at 22 n.32. Related proceedings and out-of-courts statements certainly were not covered in the motion to open the contempt hearing, but, presumably, in the April 13, 1987,

closure order which was not on appeal. Finally, Dr. Morgan seems to imply that the unsealing of the record is on appeal, when it is not. Petition at 19, and at 24 n.37.

The closure order confusion is not the only problem presented in Dr. Morgan's petition. She seems to want to appeal, not only long-standing closure orders, but all three opinions of the D.C. Court of Appeals, spun into one highly-charged diatribe.[1] Dr. Morgan discusses the opinions of the D.C. Court of Appeals, while absolutely foregoing any citation or even a reference as to which of the three opinions is being analyzed. For example, in the petition at 20, she quotes the (unspecified) opinion referring to a "clean slate" and the "presumption of openness." This language is from *Morgan v. Foretich*, 521 A.2d at 252 n.10. That is the first of the three opinions and definitely not available for review by this Court. Further, in the most recent opinion, the D.C. Court of Appeals expressly declined to "revisit the issues" from the two prior *Morgan* opinions. *Morgan v. Foretich*, 546 A.2d at 412.

Similarly, Dr. Morgan, in petition at 22, disparages the D.C. Court of Appeal's acceptance of Judge Dixon's

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[1] Dr. Foretich wishes to bring to this Court's attention the wholly gratuitous and demeaning comments about Judge Dixon. These comments are particularly inappropriate, in light of the extremely difficult job which Judge Dixon has been assigned. *See* comments of Hilary's guardian ad litem, praising Judge Dixon's efforts. *Morgan v. Foretich*, 546 A.2d at 412 n.13. The criticisms take on an even more unfavorable light, when viewed in the context of the appeal. Dr. Morgan did have on appeal the issue of Judge Dixon's recusal. If she were truly concerned about recusal, presumably her comments could have been presented to this Court in an organized manner as an issue on which certiorari were being sought. In addition, the D.C. Court of Appeals pointed out that the examples given by Dr. Morgan to support her claim of bias would probably have been better framed as separate assignments of error, which could then be reviewed on appeal. *Morgan v. Foretich*, 546 A.2d at 412 n.12.

findings that disclosure of the alleged sexual abuse would be "embarrassing and damaging to the child and the child's reputation, now and in the future." This, again uncited, quotation is from the second *Morgan* opinion, 528 A.2d at 426.[2] Dr. Morgan's use of the two prior D.C. Court of Appeals opinions obscures the fact that the issues in those opinions, particularly about the right to a public trial and access to documents, are not before this Court. Because Dr. Morgan has incorrectly and inadequately set out the specific issues on which she is petitioning this Court, there is no basis for this Court's review.

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[2] Dr. Foretich takes strong exception to Dr. Morgan's characterization of Judge Dixon's findings as "speculation," and that the revelation about matters extremely personal and private to Hilary could possibly or ever be merely "speculative, inchoate reputational interests." No one can question that the standard to be applied in this case is "the best interests of the child." *Morgan v. Foretich*, 521 A.2d at 252. Yet, here is the spectacle of Hilary's own mother arguing that the most basic and human of Hilary's rights are "speculative," while the mother is asserting her own "liberty interests" at the direct expense of Hilary. Dr. Morgan is literally trading away her daughter's birthright of freedom and privacy to gain some advantage for herself in terms of increased press coverage. The mere thought of this "bargain" makes any and all citizens cry with shame that this could happen in our country. Never has the tried-and-true balancing test made for a worse deal. And speaking of Hilary's rights—which rights of this poor child have been protected in the fifteen months since she has vanished? Her freedom of expression, her right to life and liberty have been absolutely violated. In a particularly cruel irony, Dr. Morgan appears to be making an effort to represent the public's right of access to proceedings. *See, e.g.*, petition at 10 n.11, expressing concern that the public will have a basis for evaluating Judge Dixon's competence; petition at 22 n.32, indicating that the public needs information to assess the "judicial response" to this case; petition at 23 n.34, citing *Waller v. Georgia*, 467 U.S. 39 (1984) at 46. Dr. Morgan worries about the public, but is blind to the obvious distinction that "family cases involve special considerations." *Morgan v. Foretich*, 546 A.2d at 412.

II. The trial court's ruling to deny Dr. Morgan's motion to open the contempt hearing did not violate her Fifth Amendment rights, particularly since the hearing was closed only for the segment of Dr. Morgan's testimony relating to specific acts of sexual abuse.

Dr. Morgan's petition alleges that her Fifth Amendment rights were violated because the proceedings were conducted largely "in secret." In this regard, Dr. Morgan's analysis is just as confused as was her discussion of what was actually being appealed. The recent Supreme Court opinions, including those cited by Dr. Morgan, about the right to an open trial have typically been couched in the Sixth Amendment, if invoked by the defendant (*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) at 378-80), or the First Amendment, if invoked by the public or the media (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) at 580). *See United States v. Presser*, 828 F.2d 340 (6th Cir. 1987) at 343-44. In an oft-cited explanation, this Court said that the presumption of openness may be overridden if the higher interest is stated along with specific findings. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). The D.C. Court of Appeals, in *Morgan v. Foretich*, 521 A.2d at 253, even noted that *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), specifically indicated that closure could be necessary to "protect the physical and mental well-being of a minor sex crime victim." That interest, approved in *Globe*, seems to fit rather closely the interest and rights of Hilary which were threatened by Dr. Morgan's motion to open the contempt hearing. Further, in *Waller* v. *Georgia*, *supra* at 50, this Court remanded to decide what *portions* of a suppression hearing may be closed. Thus, this Court has found that proceedings can be closed if certain interests prevail and only portions of the proceedings need be open. Those limits on the right to a public hearing describe the balancing and narrow tailoring performed by Judge Dixon. Dr. Foretich urges that the petition be

denied because Dr. Morgan's rights to an open hearing were not violated.

The particularly confusing part of the petition's analysis is its reliance on the Fifth Amendment, rather than the Sixth Amendment used in the above-cited cases. The chief case cited by Dr. Morgan, *In re Oliver*, 333 U.S. 257 (1948), discusses the Fifth Amendment concerns of a *secret* proceeding, rather than a *closed* one. Although the words could be interchangeable, in this usage, they are as different as the Fifth and Sixth Amendments. *In re Oliver* dealt with a peculiar Michigan statute, in which the judge could be a one-man grand jury. The obvious concern was the *secrecy* of the proceedings. In contrast, no secret could be worse kept than the fact that Dr. Morgan had a contempt hearing and is incarcerated. Dr. Morgan's concern is not secrecy, but openness—particularly so she can get more media play. Nothing could be more absurd than Dr. Morgan's claim that the public debate needs to be promoted, when most of her Miscellaneous Authorities are from popular newspaper, magazine and television sources. This issue has already made "60 Minutes," petition at 14 n.21, so how much more press does it really need? In addition, if Dr. Morgan can claim that much of the information about Hilary has come out in other proceedings, petition at 23, then how would repeating the allegations add to the public's knowledge? This case is nationally known, so where is the lack of "review in the forum of public opinion?" Petition at 24.

The Fifth Amendment rights which Dr. Morgan claims have been violated are not the ones she is asserting. The true Fifth Amendment rights go more to due process than to public access. For example, a potential contemnor should be given notice and a hearing. *In re Grand Jury Proceedings*, 795 F.2d 226 (1st Cir. 1986) at 234, citing, *inter alia*, *In re Oliver*, *supra* at 275; *United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir. 1973). Dr. Morgan

has had ample notice that she was in violation of the court's visitation orders. *Morgan v. Foretich*, 528 A.2d at 429. Similarly, given the size of the file in this case, there can be no claim that she has been denied the right to be heard. She has been represented by any number of well-respected attorneys, so she certainly has not been denied counsel. It is clear that Dr. Morgan's Fifth Amendment due process rights have been amply protected. There is nothing under the Fifth Amendment for this Court to review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-737

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

As noted in the petition for certiorari, *see* Petition at 13 n.18, Dr. Morgan filed a habeas corpus petition in the Superior Court of the District of Columbia on September 22, 1988, alleging that her continued incarceration for civil contempt has become punitive, and that due process therefore requires that she be released. Since the filing of the petition for certiorari, Judge Dixon has taken several actions disposing of the habeas petition. In a written order entered on November 9, 1988, Judge Dixon ordered the proceedings on the habeas petition merged and consolidated into the underlying domestic relations

proceedings, and ordered further that the petition would thereafter be treated as a motion for relief from order of civil contempt with Dr. Foretich and the guardian *ad litem* being given full opportunity to opine on the constitutionality of Dr. Morgan's continued confinement. In a written order entered on December 20, Judge Dixon denied the motion for relief from order of civil contempt, rejecting Dr. Morgan's contention that due process required her immediate release. On December 29, Dr. Morgan filed a Notice of Appeal and a Motion for Expedited Appeal from Judge Dixon's denial of her motion.

Dr. Morgan has now been incarcerated for over sixteen months for civil contempt. The fact of Dr. Morgan's incarceration and certain other aspects of her case have continued to attract considerable media attention, *see, e.g.*, Lewis, *Judgment of Solomon*, N.Y. Times, Dec. 15, 1988, at A39, *reprinted in* Appendix, underscoring the increasing public awareness of child sexual abuse cases, *see* Petition at 14-18; *cf. Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (O'Connor, J., concurring) (noting that "[c]hild abuse is a problem of disturbing proportions in today's society"). However, Judge Dixon's closure order has prevented the public from learning the evidence supporting Dr. Morgan's defense to civil contempt—evidence that Hilary has been sexually abused by Dr. Foretich—and from learning how Judge Dixon has sifted that evidence. As a consequence, the closure order has frustrated the public's ability to assess intelligently the judicial response to this case. *See* Lewis, *supra* (complaining that Judge Dixon's reasons for excluding certain evidence of sexual abuse, "like so much else" about this case, are sealed).

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APPENDIX

APPENDIX

ABROAD AT HOME—Anthony Lewis

JUDGMENT OF SOLOMON

WASHINGTON—Dr. Elizabeth Morgan is a leading plastic surgeon in Washington. Or was. For the last 16 months she has been a prisoner in the District of Columbia jail.

Dr. Morgan has not been convicted of any crime. She is in jail for civil contempt of a court order that she turn her daughter, Hilary, now 6, over to her ex-husband for unsupervised visits.

She refused to obey that order, and refuses, because she has reason to believe that her ex-husband sexually assaulted their child. In August 1987, rather than comply, Dr. Morgan sent Hilary away to a person and place unknown.

That is a bare introduction to a case of extraordinary dimensions, legal and human. At a hearing in the District of Columbia Superior Court, I found myself disturbed as I seldom have been by a legal proceeding.

Dr. Morgan took the witness stand. Her lawyer, Stephen Sachs, the former Attorney General of Maryland, asked her to describe her present circumstances. She said she shared a small cell, 6 feet by 11, with another prisoner.

"You conduct all of daily living in public," she said, with showers and toilet open to view. "There is rock music 16 hours a day. It is a depressing, confining, zoo-like existence."

But she has adjusted to it, Dr. Morgan said. And life was actually much easier "with my daughter safe."

"She begged me to hide her, so her father could not find her. . . . She understood that it might be for a short time, and it might be until she grew up."

Her ex-husband, Eric Foretich, a dental surgeon, was in court. As Dr. Morgan testified, he occasionally made circles with his forefinger at his head to suggest that she was crazy. His lawyer, John Lenahan, cross-examined.

"Where is Hilary?"

"I am not going to answer that question." But "she is healthy, she is happy and she is healing from the abuse inflicted on her by her father."

"Do you consider yourself absolutely infallible?"

"No. But in this case I've heard from my daughter, and from others, explicit descriptions of sexual acts that I'm not allowed to describe."

Judge Herbert B. Dixon has sealed much of the evidence and forbidden the parties to disclose it. But quite a bit is known.

A father is accused of child abuse.

Hilary showed traumatic signs after weekend visits with Dr. Foretich. She was examined by doctors and others. Their opinions divided, but a number believed there had been sexual abuse. A specialist in child sexual abuse, Dr. Charles Shubin, found vaginal scarring.

A particularly compelling set of facts concerned Hilary's half-sister, Heather. Dr. Morgan was Dr. Foretich's third wife. Heather, now 8, was a child of the second marriage.

Heather said she did not want to visit Dr. Foretich. In 1986 Dr. Foretich took her to a psychiatrist to try to

find out why. She told the psychiatrist that Dr. Foretich had "hurt me down there."

Judge Dixon would not hear evidence about Heather. His reasons, like so much else, are sealed.

In a collateral case, in Federal Court in Virginia, the evidence on Heather was also excluded. But the U.S. Court of Appeals for the Fourth Circuit said it should have been admitted. The panel, which included retired Supreme Court Justice Lewis F. Powell, said that "given the similarity of the injuries," evidence about Heather would have made Dr. Foretich's defenses "quite implausible."

Dr. Foretich has denied any impropriety. Judge Dixon found the evidence on sexual abuse "in equipoise." He then ordered Hilary to spend two weeks with Dr. Foretich. Her flight followed.

The latest hearing sought Dr. Morgan's release on the ground that she plainly could not be coerced into producing Hilary. Her fiancé, Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit, said she was prepared to stay in jail another 12 years if necessary—until Hilary is 18 and safe.

Judge Michel said he had counseled Dr. Morgan to obey the court and had actually taken Hilary to her father twice for weekend visits. He said: "There's nothing I've ever done in my life that I regret more than those two actions."

To disobey a court order is a grave thing in a system as dependent on law as ours is. But it is very hard to understand the way the law has been applied in this case.

Suppose the evidence, partially heard, was "in equipoise" on sexual abuse. Even that made unsupervised visits too grave a risk to what must be the dominant concern in such a case: the best interest of the child.